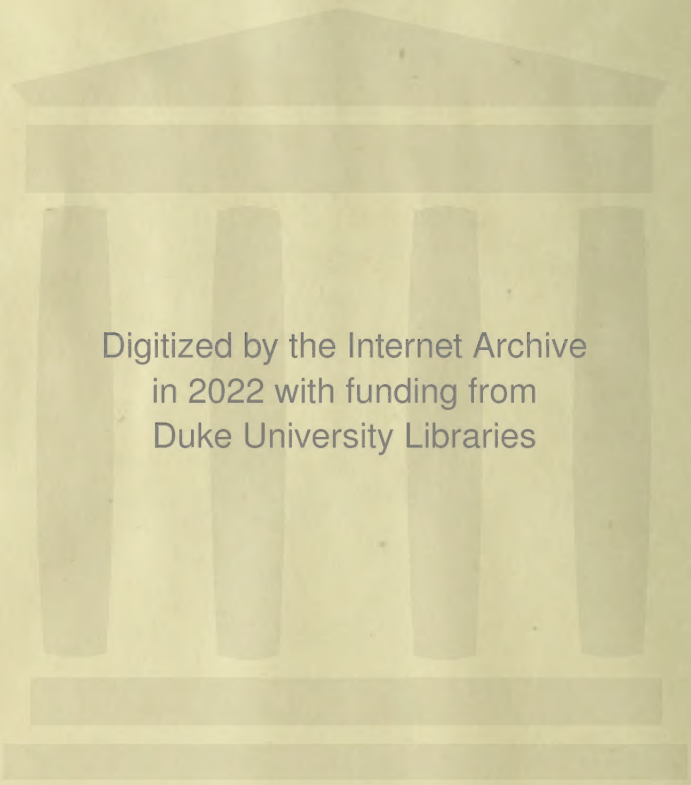

DUKE UNIVERSITY PUBLICATIONS

THE DISCRETIONARY POWERS OF SCHOOL BOARDS

THE DISCRETIONARY POWERS OF SCHOOL BOARDS

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To

DR. DAVID J. ROSE

President of the National School Boards Association

and to the

LOCAL SCHOOL BOARD MEMBERS

THROUGHOUT THE COUNTRY WHO GIVE SO UNTIRINGLY OF THEIR EFFORTS TO PROMOTE THE EDUCATIONAL ADVANCEMENT OF THE CHILDREN OF THE UNITED STATES

Preface

THE RELATIONSHIP of the teacher, the administrator, and the child influences greatly the citizen of tomorrow. It is to this end that legislators have delegated authority to boards of school control to guide them in their responsibilities in dealing with all factors that are concerned with the total education of the child. There must of necessity be safeguards to assure a free, yet controlled, environment for the greatest possible growth of the individual in mental, spiritual, social, physical, aesthetic, and manual powers.

Acknowledgments

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THE
DISCRETIONARY POWERS
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CHAPTER I

Introduction

SCOPE OF BOOK

The state legislatures, limited only by the Constitution of the United States, are supreme in having authority to control the educational policies of the several states. Therefore each legislature may delegate authority to anyone it desires. The board of school control has been created to administer and supervise schools, and in these duties broad powers are delegated or implied and a wide discretion vested in the board to carry out these powers. Since no complete study has heretofore been made of the use of such powers of boards of school control and the limitations imposed on them by the courts in the exercise of these powers, this book presents a broad sampling of the findings as revealed in cases tried or reviewed by the courts in the United States from the beginning of recorded procedures to the present time. Questions such as the following naturally arise in the course of the administration of public schools: What discretionary powers may a board of school control exercise beyond that given by statute? What acts in the exercise of discretion may be considered beyond statutory provisions? What legal limitations are placed on the use of discretion in the administration of public schools? What constitutes an abuse of authority? Court decisions bearing on such questions as these and other decisions which have arisen are fully treated, as well as decisions governing the use of discretion and the formulation of regulations as guides for boards of school control in the administration of their offices. Ruling case law cited is from the various state and federal courts.

PURPOSE OF BOOK

The purpose of this investigation is to determine from numerous court decisions just what discretionary powers are vested in a board of school control, to see how far courts will allow school boards to exercise their honest judgment when there is no statutory edict, to formulate for school officials and teachers regulations whereby they may better be guided in their duties, and to safeguard school officials and teachers against an abuse of the power delegated to them. The public-school system has long been

an agency of the state, and boards of school control as parts of the agency may exercise authority only when such authority has been delegated to it by the state legislature. The legislature is limited in its authority only by the constitution of the state and the Constitution of the United States. The legislature is therefore supreme in having authority to control the educational systems and policies of the several states. However, a legislature cannot possibly directly supervise public education, and so it must of necessity form some kind of agency to carry out its policies. It may set up whatever agency it desires and delegate to that agency powers enabling it to carry out the delegated or implied authority. Accordingly, a broad discretion may be exercised by the agency so long as its acts are not arbitrary, wanton, malicious, or otherwise an abuse of discretion.

Ordinarily the courts will not interfere with the exercise of discretion vested in a board of school control unless there is a clear abuse of the discretion or a violation of law. The courts are usually disinclined to interfere with regulations adopted by school boards; they do not have to consider whether the regulations are wise or expedient, but merely whether there is a reasonable exercise of the power and discretion of the board acting responsibly within the powers conferred. A court has no authority to control the discretion vested in a school board by the statutes of the state, and the court may not substitute its judgment for the judgment of the board upon any question which the board is by law authorized to determine.

Court decisions have been cited in this study to show that a board of school control has a broad discretion in the exercise of powers delegated to it by statute. The major questions covered are grouped into the following classifications: abuse of discretionary powers of boards of school control, and discretionary powers of boards of school control in establishing school districts and schools; in the selection, purchase, and sale of building sites; in the creation and sale of school plants; in the maintenance and operation of school plants; in the administration and supervision of schools; in control with reference to bonds; in respect to superintendents; in respect to teachers; in respect to employees other than teachers and superintendents; in the transportation of pupils; in regard to pupil attendance; in regard to discipline; in regard to curriculum; and in regard to textbooks.

LIMITATIONS

This is not an attempt to solve problems of litigation or to give interpretative ideas concerning the numerous cases reviewed,

although case studies are recorded which serve as a basis for broad action on the part of public-school authorities. This study provides a careful enumeration and representative summary of legal decisions that have been rendered concerning the actions of boards of school control in the United States from the beginning of recorded law. The material should be of practical value to school officials, boards of education, and attorneys at law.

Both delegated and implied powers vested in boards of school control are treated widely. Cases involving discretion and its abuse in the various states of the United States have therefore been carefully analyzed to determine what powers may legally be exercised and what powers are illegal. The conclusion is drawn that where there is no statute to the contrary, a board has wide possibilities in the exercise of its rights.

CHAPTER II

Abuse of Discretionary Powers by Boards of School Control

ABUSE OF DISCRETION DEFINED

An abuse of discretion is defined as an act exercised to an end or purpose not justified by, and clearly against, reason and evidence.[1] The courts will not interfere with the exercise of discretion by school directors in matters confided by law to their judgment, unless there is clearly an abuse of discretion or violation of law. The courts are usually disinclined to interfere with regulations adopted by school boards, and they do not consider whether the regulations are wise or expedient, but merely whether they are a reasonable exercise of the authority of the board acting reasonably within the powers conferred. The reasonableness and propriety of the rule is a question of law for the courts.[2] Abuse of the privileges vested in a board exists when such action is exercised (a) not in good faith, (b) unjustly, (c) inequitably, (d) with unnecessary hardships, (e) fraudulently, (f) arbitrarily, (g) unreasonably, (h) maliciously, (i) wantonly, (j) not in the best interest of the public, (k) without statutory authority.[3]

REASONABLENESS IN EXERCISE OF DISCRETIONARY POWERS

Rules and regulations set up by a board must be reasonable if they are to be enforced. Conditions surrounding a problem in one case would be immeasurably different in another case. There-

[1] Heaton v. Jackson, 34 Ohio App. 424, 171 N. E. 364 (1930); Philadelphia & Reading Coal & Iron Co. v. School Dist. of Foster Township, 30 School L. R. 207 (Pa. 1939).

[2] Schuler v. Board of Education, 370 Ill. 107, 18 N. E. 2d 174 (1938); Fabricius v. Graves, 174 Misc. 130, 22 N. Y. S. 2d 226 (1940), *aff'd*, Fabricius v. Cole, 23 N. Y. S. 2d 524 (N. Y. 1940); Donie Independent School Dist. v. Freestone Consolidated Common School Dist. No. 13, 127 S. W. 2d 205 (Tex. Civ. App. 1930); Beard v. Board of Education, 81 Utah 51, 16 P. 2d 900 (1932).

[3] Hodges v. Board of Education of Geneva County, 16 So. 2d 97 (Ala. 1943); School City of Elwood v. State, 203 Ind. 626, 180 N. E. 471 (1932); Heaton v. Jackson, 34 Ohio App. 424, 171 N. E. 364 (1930); Rogers v. School Dist. of Borough of Taylor, 44 Lack. Jur. 149 (Pa. 1943).

fore, even though wide discretion may be exercised, it must be used sensibly, or the courts will interfere.[4]

LIMITS OF POWER

A board of school control is an administrative body entitled to exercise such powers and duties as are defined by statute or those which are necessarily implied thereby.[5] The interpretation of an Ohio Supreme Court decision on April 19, 1919, is that

> A court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of the board, upon any question it is authorized by law to determine.[6]

GENERAL DISCRETIONARY POWERS IN ADMINISTRATION

A school board may establish schools of higher grade or decrease the number of grades to be taught in a school, as the interest and convenience of the people may require. The school board may also employ, pay, and dismiss teachers or other employees; build, repair, and furnish schoolhouses; purchase or lease sites, or rent suitable rooms; and make all other necessary provisions relative to such schools as may be deemed proper. The board may charge tuition and incidental fees if necessary, so far as statutory provisions will allow, and so long as wantonness, arbitrariness, and any other abuse of power are absent.[7] Honest judgment is given great consideration by courts; in some instances courts have upheld even erroneous decisions of the boards and have not declared them to be an abuse of authority, because in the opinion of the courts the boards were honest in their judgment. Furthermore, the judgment may not be reviewed unless it is clear that there is a wilful disregard of duty.[8] Many decisions support the theory that apparent disregard of duty or abuse of discretionary power by a board is reviewable by the courts.[9]

[4] Board of Education v. Bolton, 85 Ill. App. 92 (1899); Trustees of Schools v. People *ex rel.* Van Allen, 87 Ill. 303 (1877); State v. Vanderbilt, 116 Ind. 11, 18 N. E. 266 (1888); Fertich v. Michener, 111 Ind. 472, 11 N. E. 605 (1887); Holman v. School Trustees of Avon, 77 Mich. 605, 43 N. W. 996 (1889); Roe v. Deming, 21 Ohio St. 666 (1871); State *ex rel.* Bowe v. Board of Education, 63 Wis. 234, 23 N. W. 102 (1885).

[5] State Line Consolidated School Dist. No. 6 v. Farwell Independent School Dist., 48 S. W. 2d 616 (Tex. Civ. App. 1932).

[6] Brannon v. Board of Education, 99 Ohio St. 369, 124 N. E. 235, 236 (1919).

[7] Board of Education of Richmond County v. Cumming, 103 Ga. 641, 29 S. E. 488 (1898).

[8] Detroit Tug and Wrecking Co. v. Gartner, 75 Mich. 360, 42 N. W. 968 (1889).

[9] Christian v. Jones, 211 Ala. 161, 100 So. 99 (1924); Wilson v. Board of Education, 137 Ill. App. 187 (1907), *aff'd*, 233 Ill. 464, 84 N. E. 697 (1908); Kinzer v. Directors, 129 Iowa 441, 105 N. W. 686 (1906); Wayland v. Hughes, 43 Wash. 441, 86 Pac. 642 (1906).

SUMMARY

1. Any act exercised to an end or purpose not justified by reason and evidence constitutes an abuse of discretion. Boards of school control may act reasonably in exercising authority delegated to them without interference by the courts.

2. Rules and regulations set up and enforced by the board must be reasonable.

3. Boards of school control are administrative agents of the legislature and are entitled to exercise such powers and duties as are defined by statute or can be implied by statute.

4. Unless the board evidences wilful disregard of duty or wantonness, arbitrariness, or any other abuse of power, and provided the board acts in the interest and for the convenience of the people according to its honest judgment, the courts cannot review its actions.

CHAPTER III

Powers of Boards of School Control in Establishing School Districts and Schools

CREATION OF SCHOOL DISTRICTS

Discretionary Power of Legislature in Creating School Districts.—The plenary power of the legislature over the creation of school districts is absolute. Such power may provide for the establishment of school districts for different purposes and confer upon a board of school control such powers as it deems best within the limits of the state and national constitutions. An Illinois court held that

> There is no constitutional limitation placed upon the Legislature with reference to the formation of school districts or as to the agencies the state shall adopt for providing for free schools. It is entirely competent for the Legislature to provide for the establishment of township high schools as well as school districts, and to confer upon each of said boards the power of taxation to the extent of the Legislature's will.[1]

Such school districts are subject to the plenary control of the legislature. The legislature from time to time, in its discretion, may abolish school districts, enlarge or diminish their boundaries, or increase, modify, or abrogate their powers. The exercise of such power through statute is constitutional.

Delegation of Powers to Agents.—The legislature may delegate to its agents any power not legislative in character, but it determines the limitations within which a board of school control may exercise the power so delegated.

[1] People *ex rel.* Holmes v. Cleveland, C., C. & S. L. Ry., 288 Ill. 70, 122 N. E. 792, 795 (1919); Priest v. Moore, 183 Ark. 999, 39 S. W. 2d 710 (1931); School Dist. No. 26 v. Baxter County Board of Education, 183 Ark. 295, 35 S. W. 2d 1013 (1931); Manley v. Moon, 177 Ark. 260, 6 S. W. 2d 281 (1928); Board of Education of Burke County v. Hudson, 164 Ga. 401, 138 S. E. 792 (1927); People *ex rel.* Board of Education v. Board of Education, 380 Ill. 311, 43 N. E. 2d 1012 (1942); Keime v. Community High School Dist. No. 296, 348 Ill. 228, 180 N. E. 858 (1932); People *ex rel.* Swingle v. Pinari, 332 Ill. 181, 163 N. E. 385 (1928); City of Dallas v. Love, 23 S. W. 2d 431 (Tex. Civ. App. 1930).

The boundaries of school districts may be changed at the will of the Legislature, and the constitutions and statutes very commonly provide for such change on petition of the residents, citizens or voters thereof. In some cases the power to create and change the boundaries is invested by the Legislature in local boards or officers. In such case the discretion of the board is broad, and the courts will not interfere with its exercise except in cases of clear abuse thereof. . . .[2]

DISCRETIONARY POWER OF SCHOOL BOARDS TO CREATE OR ALTER SCHOOL DISTRICTS

It is a general rule of law that a board of school control has broad discretion in the creation or alteration of school districts and that its decision is final.

Creation of School Districts for the Welfare of the Community.—A board or superintendent may not, however, organize a new district or alter boundaries of a district or transfer property from one district to another unless the change would be for the best interests of the people of the territory affected. The wishes and convenience of the majority of the constituents must be considered, and in some cases their consent must be given to the change.[3]

Mandatory Exercise of Power.—Some statutes call for a vote or petition by the people for the creation or alteration of school districts. When the language of a statute grants to subordinate agents power to create, alter, or consolidate districts, then it is held mandatory upon those agents to carry out any change the people of a district or districts wish, provided the people have carried out the provisions of the statute authorizing the change and provided that the change is, in the judgment of the board, for the best interest of the people. For example, in one case in Missouri it was held that where all districts involved voted in favor of a boundary change, action on the part of the agents to carry out the change was mandatory, but where a majority of the voters were not in favor of the change or where only one district was affected, then the agents could use their own discretion in making the change.[4]

[3] *In re* Chelan Electric Co., 152 Wash. 412, 278 Pac. 171, 172 (1929); Board of Education of Burke County v. Hudson, 164 Ga. 401, 138 S. E. 792 (1927); Henderson v. Miller, 286 S. W. 501 (Tex. Civ. App. 1926).

[4] Priest v. Moore, 183 Ark. 999, 39 S. W. 2d 710 (1931); *In re* Dahlgren v. School Dist. No. 31, 134 Minn. 82, 158 N. W. 729 (1916); Gwynne v. Board of Education, 259 N. Y. 191, 181 N. E. 353 (1932), *reversing* 234 App. Div. 629, 252 N. Y. S. 625 (1931); *In re* Baumstown School Dist., 22 Pa. Dist. 856 (1913); Merritt School Dist. No. 50 v. Kimm, 157 P. 2d 989 (Wash. 1945).

[4] School Dist. No. 42, Adrain County v. School Dist. No. 45, 212 Mo. App. 670, 254 S. W. 726 (1923); *In re* Chelan Electric Co., 152 Wash. 412, 278 Pac. 171 (1929).

ABUSE OF DISCRETIONARY POWER

Issuing a Mandamus.—If a board proceeds according to an erroneous theory of law or acts arbitrarily, fraudulently, or unjustly so as to constitute an abuse of judgment, judicial interference is justified. If the board should abuse its power, the court may issue a mandamus.[5]

No district may be changed so as to deprive an educable child of reasonable school facilities within convenient reach by whatever method of conveyance, if any, that may be provided. When changing a district, a board should consider the conditions of the roads and the topography of the territory—whether it is mountainous or whether there are other militating influences which would make the school unapproachable. When these conditions are judged fairly, the court will not interfere.[6]

An Arkansas court ruled as follows on a case concerning the division of a school district:

> The exercise of sound discretion on the part of the board in the organization or formation of a new district upon proper petition does not mean that the board may greatly inconvenience, oppress, or outrage any parties residing in any part of the territory.[7]

Creation of Districts to Enhance Values.—A board does not abuse its authority in refusing to establish a school district in order to increase trade or to enhance the value of school property. Commercial aspects do not constitute just cause for the creation of a school district or for the location of a school.

STATUTORY PROVISIONS

Districts Created by State Legislature.—When the legislature of a state creates a special school district, neither a county board of education nor any other governmental agency can change the boundaries thereof without legislative authority.[8]

[5] "A mandamus is a high prerogative writ, usually issuing out of the highest court of general jurisdiction of the state, in the name of the sovereignty, directed to any natural person, corporation, or inferior court of judicature within its jurisdiction, requiring them to do some particular thing therein specified and which appertains to their office or duty"—Bouvier's LAW DICTIONARY, p. 748; School Dist. No. 3 of Adams v. Callahan, 237 Wis. 560, 297 N. W. 407 (1941).

[6] Myers v. Board of Supervisors of De Soto County, 156 Miss. 251, 125 So. 718 (1930).

[7] Bledsoe v. McKeowen, 181 Ark. 584, 26 S. W. 2d 900, 901 (1930); Bell County Board of Education v. Wilson, 263 Ky. 556, 92 S. W. 2d 821 (1936); Board of School Trustees of Lubbock County v. Woodrow Independent School Dist., 90 S. W. 2d 333 (Tex. Civ. App. 1935).

[8] Carter Special School Dist. v. Hollis Special School Dist., 173 Ark. 781, 293 S. W. 722 (1927); Munn v. Lentz, 256 Mich. 233, 239 N. W. 298 (1931).

Prior Special Statute.—A statute authorizing a county superintendent to change or modify boundaries of any school district was held by a Nebraska court inapplicable to boundaries of school districts fixed by prior special statute, where it was the intention of the legislature that effect should be given both statutes.[9]

Special Agent.—In some states the power to alter school districts is left to the county or state board of education, or to both. In North Carolina the county board of education advises, and the State School Commission passes judgment.[10]

Vote of Electors.—In most states a majority of the people in the district concerned must be in favor of a change. Then the board of school control acts upon the discretionary power allowed through statutory provision, using its own judgment as to whether it will act or not, unless circumscribed by statute to the contrary. On March 19, 1925, the Supreme Court of Alabama held that

> The county board is not bound to make consolidations. It is required to do so only when it deems it practicable, and, with respect to separate district schools, it cannot act at all except by the free consent of the local trustees. If that consent is given upon a stated condition, the county board may reject the consent and decline to act; but, as a matter of legal principle, as well as of sound morals, they cannot accept the consent and at the same time reject the condition.[11]

Petition of Electors.—In some states it is provided by law that a proposed change must be presented to the board by means of a petition signed by the taxpayers of the district or districts concerned. Under a statute providing that notice shall be given by petitioners proposing a change in the school district or school districts, it is not required that a notice signed by all electors be given; only the signatures of a majority of the electors are necessary. After such conditions are complied with, the board may act according to its judgment in making the change for the best of all concerned.[12]

Where a statute provides that one third of the voters in each district shall sign a petition for alteration of the school district, a board is held unauthorized to consolidate two or more districts without this petition from each district concerned.[13] In one case

[9] Plattsmouth Bridge Co. v. Turner, 128 Neb. 738, 260 N. W. 562 (1935).
[10] Venable v. School Committee, 149 N. C. 120, 62 S. E. 902 (1908).
[11] State *ex rel.* Wright v. Campbell, 212 Ala. 493, 103 So. 471, 473 (1925).
[12] School Dist. No. 18 v. Grubbs Special School Dist., 184 Ark. 863, 43 S. W. 2d 765 (1931); Beard v. Albritton, 182 Ark. 538, 31 S. W. 2d 959 (1930); State Line Consolidated School Dist. No. 6 v. Farwell Independent School Dist., 48 S. W. 2d 616 (Tex. Civ. App. 1932); Bell v. Kirkland, 41 S. W. 2d 443 (Tex. Civ. App. 1931); Beard v. Marshall, 32 S. W. 2d 76 (Tex. Civ. App. 1929).
[13] Mills v. State Board of Education, 167 S. C. 429, 166 S. E. 500 (1932).

more than one third of one district presented a petition for consolidation, but the second district presented no petition at all; according to a South Carolina statute, such action renders consolidation without effect. The court held that, even though the board assumed discretionary power, it could not go beyond the implied power given it by statute.[14]

ALTERATION OF SCHOOL DISTRICTS

Changing a Boundary.—When a board considers it necessary to change district lines for some good cause, its discretion may be followed. Conditions for the best interest of the citizens and taxpayers affected will determine the course to pursue, provided that the majority of the citizens and taxpayers desire the change. The following decision was made by the Supreme Court of Georgia, June 9, 1922:

> A county board of education has the right, when "local conditions" in their judgment make it necessary for the best interest of the citizens and taxpayers to be affected thereby and a majority of whom desire it, to change the line or lines of any school district at any time, when in their judgment the best interest of a school requires such change.[15]

In some states the change of boundaries may be made under certain conditions without any petition from the taxpayers. A Mississippi court ruled that a county school board may on its own initiative change boundaries of school districts provided that no tax has been levied and the school has not been in operation as much as one session.[16]

Annexing and Dividing Territory.—A school board may add or take away from school districts, either by annexing adjacent territory or by dividing territory already set up, whether the purpose is for establishing or eliminating a school or both. The Court of Civil Appeals of Texas ruled in 1932 that according to statute

[14] Watson v. Spartanburg County Board of Education, 141 S. C. 347, 139 S. E. 775 (1927); Hildebrand v. High School Dist. No. 32, 138 S. C. 445, 136 S. E. 757 (1927).

[15] Stephens v. Ball Ground School Dist., 153 Ga. 690, 113 S. E. 85, 87 (1922); Hope v. Shelby County Board of Education, 213 Ky. 717, 281 S. W. 815 (1926); State *ex rel.* Miller v. Eisenbise, 142 Kan. 251, 46 P. 2d 852 (1935); State *ex rel.* Boynton v. Conley, 138 Kan. 818, 28 P. 2d 744 (1934), *reversed,* 139 Kan. 687, 33 P. 2d 165 (1934); Audas v. Logan County Board of Education, 246 Ky. 534, 55 S. W. 2d 341 (1932); Whaley v. County Board of Education, 239 Ky. 341, 39 S. W. 2d 475 (1931); *In re* Chelan Electric Co., 152 Wash. 412, 278 Pac. 171 (1929).

[16] Amite County School Board v. Reese, 143 Mass. 880, 108 So. 439 (1926).

it is provided, in substance, that the board of county school trustees shall have authority, when petitioned as therein provided, to detach from and annex to any school district, territory contiguous to the common boundary line of the two districts. . . .[17]

In Texas, where a statute allowed school boards to divide territory into districts of certain dimensions and populations, the Supreme Court of Texas in 1912 ruled in one case that the permission granted by statute did not confer mere discretion but imported an imperative obligation that county commissioners make reasonable division of the territory under their control. Although the statute named the specifications for the minimum size and population of a district, the court interpreted it as implying obligation on the part of the board to make necessary divisions when districts were too large or too greatly populated.[18]

Annexing Adjacent Territory to Independent Districts.—The court will not interfere with the use of discretion of a board of school control under a statute authorizing a board to attach or annex to an independent district adjacent territory. The extent of the territory which may be properly regarded as adjacent, and hence the territory which may be attached or annexed, is within the sound discretion of the board provided it does not exceed statutory limitations.[19] In a case where the claimant said that a board had no right to annex territory to its district because that territory was not, in a statutory sense, adjacent, the South Dakota Supreme Court ruled:

As the expediency of attaching to independent districts territory outside of the city limits, but adjacent thereto, was left to the board of education and the majority of the electors of such territory, there is no merit in the contention that the board was without jurisdiction to make the order.[20]

Dividing School Townships.—A board may divide townships into school districts to suit the wishes and conveniences of the majority of the people for school purposes. But the school units of the division of a township must be sufficient in size to meet standards set up by the state board of school control. A North Carolina Supreme Court decision on November 18, 1908, stated:

[17] Plemons Independent School Dist. v. Stinnett Independent School Dist., 46 S. W. 2d 734, 736 (Tex. Civ. App. 1932); Snow v. South Shore Independent School Dist., 283 N. W. 530 (S. D. 1939); Prosper Independent School Dist. v. Collin County School Trustees, 51 S. W. 2d 748 (Tex. Civ. App. 1932).

[18] Henderson v. Miller, 286 S. W. 501 (Tex. Civ. App. 1926).

[19] Redfield School Dist. No. 12 v. Redfield Independent School Dist. No. 20, 14 S. D. 229, 85 N. W. 180, 181 (1901).

[20] McLaughlin v. Smith, 105 Tex. 330, 148 S. W. 288 (1912).

The duty of dividing the townships into school districts and the erection and maintenance of school buildings is left to the judgment of the school board. . . .[21]

Merging of Districts with County-School Systems.—The authority to merge grade- or common-school districts with county-school systems rests with the boards of school control, unless there is statutory provision to the contrary. In Kentucky it was found that the resources of a graded-school district procured by means of taxation, donations, tuition, and its share of state funds were inadequate to meet the necessary expenses of the district, and that the only practical thing to do was to merge that district with the county district. On October 16, 1931, the Court of Appeals of Kentucky rendered the following decision:

> It will be noted that, under the statute, the question whether or not there shall be a merger of graded school districts with the county school system rests in the sound discretion of the boards of these graded and county districts and under familiar principles of law that discretion, when exercised, cannot be interfered with by the courts unless it has been abused or the boards acted arbitrarily.[22]

Consolidation of School Districts.—A board of school control has authority to form new districts out of old ones or to consolidate two districts into one, and if its action is not arbitrary or unreasonable, no court will interfere.[23] Where it is shown that the consolidation of one district with another will benefit the district which desires to be annexed, but will not be profitable for the district as a whole, however, the board may refuse to grant the request of consolidation.[24]

Necessity of Caring for an Original District.—If a part of a district wishes to separate from the original territory and be joined to another district, a board is not justified in allowing such an action if insufficient territory should be left in the original district to maintain a school, unless such territory should be added to another district. The opinion of the Supreme Court of Mississippi, January 20, 1930, was:

[21] Pickler v. Board of Education of Davie County, 149 N. C. 221, 62 S. E. 902 (1908); Board of Education of Wirtland Independent School Dist. v. Stevens, 261 Ky. 475, 88 S. W. 2d 3 (1935).

[22] Gibson v. Wilson, 240 Ky. 524, 42 S. W. 2d 710 (1931); Whaley v. County Board of Education, 239 Ky. 341, 39 S. W. 2d 475 (1931).

[23] Cherokee County Board of Education v. Chandler, 221 Ala. 451, 129 So. 473 (1930); Perry v. Gill, 184 Ark. 1099, 44 S. W. 2d 1084 (1932); Milsap v. Holland, 184 Ark. 966, 44 S. W. 2d 662 (1931); Bledsoe v. McKeowen, 181 Ark. 584, 26 S. W. 2d 900 (1930); State *ex rel.* Smith v. Board of Education of Pittsburgh, 128 Kan. 487, 278 Pac. 741 (1929).

[24] *In re* Baumstown School Dist., 22 Pa. Dist. 856 (1913).

It is necessary . . . that a school district must be either entirely added to the consolidated district or there must remain enough territory and pupils in the part not added to maintain a public school therein. If enough do not remain, then the proceeding is defective and cannot be carried out, because boards cannot constitutionally so arrange districts as to leave any child of school age without facilities for attending the public schools.[25]

Re-establishment of Consolidated School Districts.—Where statute provides that a previously abandoned or consolidated school district may be re-established on petition of the voters of the district affected, the Supreme Court of Indiana in 1910 ruled that a school trustee may refuse to recommend the creation of a schoolhouse in the district if its erection is unnecessary because existing facilities are adequate.[26]

Joint Schoolhouse.—Upon proper petition a school board of one district may unite with a school board of another district in the erection of a joint schoolhouse, and the courts will not interfere unless there is an abuse of judgment. In some states, for example, Indiana, signatures to a petition of a majority of the school patrons of each former district are not required.[27] In one case a board of one district wished to unite with three other districts in the erection of a high-school building to accommodate all pupils in all the districts. The school quarters were located in a rented building. Some of the citizens in the district declared that the facilities with which the board was operating were adequate, that even if there should be a change the board could get a less expensive site and construct a cheaper building than that proposed, and that such a building would be sufficient without the expenditure of a great sum of money. In sustaining the action of the board, the Supreme Court of Pennsylvania, April 13, 1925, held that the board was free to follow its own discretion in the matter so long as it was within statutory limitations.[28]

Gerrymandering.—One of the most famous and spectacular uses of the authority to create new school districts occurred in a voting district in Massachusetts in 1812 while Elbridge Gerry was governor. By proceeding arbitrarily so as to include the territory desired and to eliminate certain other sections, the proponents of the new district established a strangely shaped district which, as

[25] Myers v. Board of Supervisors of De Soto County, 156 Miss. 251, 125 So. 718, 721 (1930).

[26] Good v. Howard, 174 Ind. 358, 92 N. E. 115 (1910).

[27] Advisory Board of Harrison Township v. State, 170 Ind. 439, 85 N. E. 18 (1908); Hendricks v. State, 151 Ind. 454, 50 N. E. 559 (1898).

[28] Day v. School Dist. of Amwell Township, 283 Pa. 248, 128 Atl. 846 (1925); Sheetz v. Norristown School Dist., 11 Pa. Dist. 403 (1901).

critics pointed out, resembled a salamander. By combining *Gerry* and *salamander* one humorous critic coined the new word *gerrymander,* which soon gained currency in English as the name of any arbitrary garbling so as to give an unfair advantage to a special group or political party.

Persons desiring to be left out of a consolidation for selfish purposes must not be heeded by a board of school control in making its determination about the district or districts. Everybody and everything within the territory must be given due consideration, and favoritism must not be shown. People may not be discriminated against by the gerrymandering of the district at the hands of the board, just as people may not be favored. In a case where only four children were to be left in a district if a proposed change were carried out in redistricting a school territory, the Supreme Court of Oregon in 1910 stated:

> . . . while we do not question the good intent of the board and their desire to do justice in the premises, we are satisfied that the effect of their decision is to deprive the children of plaintiff of the privilege of attending a public school in their own district, and eventually to abolish the district; and that it is not an act governed and regulated by a sound discretion, but arbitrary and unjust.[29]

SUMMARY

1. The legislature of a state has absolute power to create school districts, and the districts of the state are subject to the plenary control of the legislature.

2. The legislature may delegate to boards of school control any power not legislative in character, but it determines the limitations of their power.

3. Boards of school control must make changes in the districts according to the wishes and convenience of the majority of the constituents of the districts, and in some cases the consent of voters or petitioners must be given to changes.

4. Where statutes call for a vote or petition of the people to effect the creation or alteration of a district and where the people carry out the provisions of the statutes, it is mandatory on the board to make the change unless there is positive evidence that such a change would not be for the best interest of the people.

5. If a board acts arbitrarily, fraudulently, or unjustly so as to constitute an abuse of its powers, the court may issue a mandamus. The board may not make a change so as to deprive any child in the district of reasonable school facilities within con-

[29] Nicklaus v. Goodspeed, 56 Ore. 184, 108 Pac. 135, 136 (1910).

venient reach of his home. The board may not greatly inconvenience, oppress, or outrage any persons living within its district territory.

6. A board may not make changes or allow the electors of a district to demand changes in district boundaries which enhance the value of property.

7. When the state legislature creates a special school district, no board may change the boundaries thereof without legislative authority.

8. If the legislature fixes the boundaries of a district by special statute, a later statute authorizing a change in the boundaries of any school district is not applicable.

9. In some states a special agent, such as the North Carolina State School Commission, is empowered to create or alter school districts.

10. In most states the creation or alteration of districts must be voted upon by the taxpayers of the district or districts concerned, but the board of school control is not always obliged to make the change.

11. In some states a proposed change must be presented to the board by means of a petition signed by taxpayers of the district or districts concerned. If two or more districts are concerned, all districts must present a petition.

12. Boards of school control are allowed, within statutory limits, to change boundaries of districts.

13. Territory may be annexed to a district or divided into districts. In some cases it is obligatory on the board to divide a district when there is unequal division of districts.

14. If statute authorizes a board of school control to annex adjacent territory to an independent district, the board is the judge of what territory shall be annexed.

15. A board may divide townships into districts provided the school units of the division meet standards set up by the state board of school control.

16. Grade- and common-school districts may be merged at the discretion of the school board unless there is statutory provision to the contrary.

17. A board of school control has authority to form new districts out of old ones or to consolidate two or more districts into one.

18. The court will interfere with the action of a board which consolidates districts or annexes a part of a district and leaves the original district with insufficient territory to maintain a school.

19. Previously abandoned or consolidated school districts may be re-established, but if a petition is drawn up to re-establish an unnecessary district, the board may refuse to do so.

20. Two school boards may unite their districts to build a joint schoolhouse.

21. A board may not gerrymander in changing a district without due consideration and regard for the best interests of all the people concerned.

CHAPTER IV

Powers of Boards of School Control in the Selection, Purchase, and Sale of Building Sites

POWER DELEGATED TO BOARDS OF SCHOOL CONTROL

THE legislature creates a board of school control and delegates to it authority to use its discretion in the selection, purchase, change, and sale of sites, so long as there is no abuse of the powers which have been conferred or necessarily implied.

Broad Discretion.—A board has a wide discretion in the selection of sites. The Supreme Court of South Carolina in 1920 ruled on one case that since "the location of the school building was an administrative matter within the discretion and judgment of the school trustees, subject to the appellate and supervisory power of the county and state boards of education," when a board has decided upon a site for the erection of a building and this decision has been confirmed by the county and state boards of education, in order to change this site "individuals should show that they are threatened with some special damage not common to the public before they are entitled to enjoin action by such boards on the ground that they are about to abuse their powers."[1]

SCHOOL SITES

Meaning of School Sites.—A North Carolina court ruled that the meaning of the word *site* as used in the statute is broad enough to embrace such land, not exceeding statutory limitation, if there is such limit, as may be reasonably required for the suitable use of any school building.[2] The board may select and use such site for any purpose associated with and for education.

Protest to the Selection of Site.—The selection of a school site in general is vested in the board of school control, and its decision will not be interfered with unless it appears that the board is acting arbitrarily or abusing its privilege.[3] In the *Hufford v.*

[1] McCollum v. Crosby, 114 S. C. 169, 103 S. E. 514 (1920).

[2] Board of Education of Orange County v. Forrest, 190 N. C. 753, 130 S. E. 621 (1925).

[3] Munn v. Independent School Dist., 188 Iowa 757, 176 N. W. 811 (1920); Spaulding v. Campbell County Board of Education, 239 Ky. 277, 39 S. W. 2d 490 (1931); Vincent v. Edmondson County Board of Education, 169 Ky. 34, 183 S. W. 232 (1916); Board of Education of Hopewell Rural School Dist. v. Littick, 42 Ohio App. 515, 182 N. E. 531 (1932).

Herrold case in Iowa several sites were suggested. The site selected by the board was protested by a group of petitioners in the district as being too much to one side. The court held, however, that since there was no evidence of an abuse of authority, the action of the board should be confirmed. Although the court refused to interfere, the statute permitted an appeal by the voters to the county superintendent of schools or to the state superintendent of public instruction, after an appeal to the county superintendent had been acted upon.[4]

Voting for and Locating School Sites.—It is usually better to determine first whether a vote may be carried for the establishment of a school before a school site is selected. When the bonded proposition is submitted to the voters, they must decide whether they want a schoolhouse and, if so, the amount they are willing to pay for the site and the erection of the building. The location of the site need not first be designated, since it may have to depend upon the proceeds of the bonds, and the board may be compelled through necessity to choose a site greatly inferior to that which before the election was thought to be suitable. In 1931 the Michigan Supreme Court stated:

> . . . we are impressed that the provision for bonding is in no way related to that providing for designation of the site. When the bonding proposition is submitted to the voters, it is for them to decide whether they want a new schoolhouse, and, if so, the amount they are willing that the board of education shall expend in the purchase of a site and the erection of the building. The location of the site may, to some extent at least, be dependent upon the moneys received by the board from the proceeds of the bonds when issued and sold.[5]

Joint Meeting to Establish Sites.—The discretion vested in a board of school control to establish sites is rather wide. This exception has been made in Pennsylvania: If there is dissension among the voters as to a site selected because of some dangerous natural or artificial cause, the court may interfere. In a case where there was a dangerous crossing near the site and some of the voters rebelled against the choice, the court held that it would be necessary to interfere unless the borough directors and the township directors should in a joint meeting consider the facts and endeavor to come to a mutually satisfactory understanding on the selection of the site.[6]

[4] Hufford v. Herrold, 189 Iowa 853, 179 N. W. 53 (1920).

[5] Stranger v. Miller, 255 Mich. 132, 237 N. W. 533, 534 (1931); Board of Education of Detroit v. Moross, 151 Mich. 625, 114 N. W. 75 (1907).

[6] Zimmerman v. Miller, 22 Pa. Dist. 264 (1912); Neale v. Foster Township School Dist., 20 Pa. Dist. 467 (1911); Mason v. Mulligan, 12 Kulp. 120 (1904); Gaston v. Meadville Schools, 5 Pa. Dist. 549 (1896).

Purchasing New Sites or Changing Sites.—Except in case of abuse, whenever a board is given discretionary power to purchase school sites, it may in an unhampered way purchase the site that it believes to be for the best interest and the greatest good of the greatest number of people concerned, even though a city or consolidated district already owns the site which is in use. A Missouri Court of Appeals decision in 1931 is typical of the attitude of several other court decisions:

> . . . in our opinion . . . the board of education in consolidated districts [are given] full power in the matter of selecting schoolhouse sites or changing sites whenever, in their judgment, such changes should become necessary.[7]

Because of the changing conditions in a fast-growing country it is quite often necessary to change school sites from noisy places which are not conducive to the greatest interest of a learning situation. Unless there is a statutory provision to the contrary, a board of school control may change a site for a school building. It has absolute authority to do so regardless of the fact that the former site may be owned by the district or that the site may be in the center of the district and two thirds of the voters in favor of retaining the old site.[8]

Sale of Site.—In some jurisdictions the board of school control may sell or otherwise dispose of school property when it is no longer necessary for school use.[9] A sale will not be voided if fairly and honestly made even if it is subsequently found that the public land was worth more at the time of the sale than it was sold for.[10] If statutes permit the sale of a school site, whether school land is any longer required for school use is a question wholly within the discretion of the district.[11] All sales of school sites must be made, however, in compliance with the terms of the statute authorizing the sale.

SUMMARY

1. The legislature delegates to a school board its powers to select, buy, and sell school sites.

[7] Crow v. Consolidated School Dist. No. 7, 131 Mo. App. 728, 36 S. W. 2d 676, 678 (1931); Velton v. School Dist. of Slater, 222 Mo. App. 997, 6 S. W. 2d 652 (1928); Gladney v. Gibson, 208 Mo. App. 70, 233 S. W. 271 (1921); Young v. Consolidated School Dist. No. 3, 196 Mo. App. 419, 193 S. W. 627 (1917).

[8] James v. Gettinger, 123 Iowa 199, 98 N. W. 723 (1904); Crabtree v. Board of Education of Durham County, 199 N. C. 645, 155 S. E. 550 (1930).

[9] School Dist. No. 6 in Dresden v. Aetna Insurance Co., 54 Me. 505 (1865).

[10] Sherlock v. Village of Winnetka, 68 Ill. 530 (1873).

[11] M'Cullough v. School Directors of Fourth Ward, 11 Pa. 476 (1849).

2. The school board may, under legislative authority, select the site for a school which it believes the most suitable for the people of the district, and despite protest from taxpayers its decision will be final if there has been no abuse of discretion.

3. A school site embraces such land as may be required for the suitable use of the school building, and the site may be used for any purpose associated with and for education.

4. If a school board acts arbitrarily or evidences abuse of discretion in the selection of a school site, statutes usually permit taxpayers to appeal to the county or state superintendent for action against the selection.

5. The purchase of a school site may depend upon money received from the proceeds of bonds to be issued and sold, so that it is not necessary to choose the location of the site before the bonded proposition is submitted to the voters.

6. Sometimes a court will rule that a joint meeting of the borough and township directors be held in order to come to a mutually satisfactory selection of the site.

7. Because of noises or crowded conditions it is often necessary to change the location of a school site. A school board may purchase a new site even though it already owns one.

8. All sales of school sites must be made in compliance with the terms of the statute authorizing the sale.

CHAPTER V

Powers of Boards of School Control in the Creation and Sale of School Plants

SCOPE OF BUILDING POWER

Ministerial Power.—The contractual powers of a board of school control regarding the construction of school buildings are regulated by statute. Any authority, power, or duty which a school district or board of school control may have for providing buildings or constructing them is governed by statute. Boards of school control have no power except that expressly or impliedly conferred or imposed by the legislature.[1] The power with which a board is endowed in the construction of a building is ministerial in character. This power cannot be exercised to gratify a whim, caprice, or an individual desire on the part of an influential voter, but must be exercised in good faith and for the greatest interest of the public.[2] Usually the courts will not interfere with the powers delegated to the board by granting a writ of injunction restraining the construction of a school building which, in the opinion of the board, is necessary to carry on the school work.[3]

Statutory Provisions Concerning Buildings.—Because of the great advance of ideas concerning education in the United States within the past two decades, many changes have taken place in the requirements by the states for the construction of schoolhouses. Some of the statutes of the states say that school buildings must be properly and scientifically constructed. They must be adequate in plan and structure to meet the demands of modern education. Therefore the states fix the power, duty, and manner of proceedings in the construction of school buildings, and the boards are given discretion in selecting the type and price of building necessary, within limitations.

Conflict in Statutes.—A statutory provision giving a township board discretionary power to build a schoolhouse where given conditions have been fulfilled is not repealed by another provision

[1] Andrews v. Estes, 11 Me. 267 (1834).

[2] Iverson v. Union Free High School Dist., 186 Wis. 342, 202 N. W. 788 (1925).

[3] Millard v. Board of Education, 121 Ill. 297, 10 N. E. 669 (1887).

placing positive duty on the township board in other circumstances. For instance, in Indiana a statute required that a high school should be established within three miles of the township boundary, provided no high school existed within three miles of the township boundary. The cost of building a high school would have exceeded the township's constitutional limit of indebtedness, and the school board used its discretion in appropriating an adequate building in the town for both a primary and a high school. In sustaining the board in its action the Supreme Court of Indiana ruled that the statute dealing with the requirement for a high school

should be so construed as not to conflict with the Constitution, if it can be reasonably done. The Constitution and all statutes relating to the subject under consideration should be read and construed together, to carry out the general purpose, and save the statute. Therefore a condition should be read into this section—in fact, is placed by the Constitution in this section—to the effect that, if the constitutional debt will be exceeded by the erection of a high school building, the mandate of the statute is not effective.[4]

Discretion in Kind and Type of Building.—A board of school control may determine the necessity for building and the kind of building desirable, within the limits defined by statute, unless it is limited by a vote of electors. A board is within its rights if it should decide to erect a building with an auditorium, gymnasium, workshop, or any other kind of department that would be for the benefit of the school. The board also has power to control the use of the building in any way it deems best for the welfare of the community as a whole. Although some parts of the plant may be used only occasionally, a court is not justified in upholding a complaint brought against the action of the board.[5] A Vermont court stated:

It is lawful for a district to provide such building and rooms as in the exercise of an honest discretion it shall judge that the interests of the district, in the matter of its schools and for the purpose of its schools, require.[6]

On the other hand, a board may not go so far as to abuse its discretion:

. . . if the view and purpose were . . . to use the occasion of building a school-house as a pretext for making a public hall for town meetings,

[4] Smith v. State *ex rel.* Shepard, 187 Ind. 594, 120 N. E. 660, 663 (1918).

[5] Sheldon v. Centre School Dist., 25 Conn. 224 (1856); Woodson v. School Dist. No. 28, 127 Kan. 651, 274 Pac. 728 (1929); Hopkins v. Howard, 131 Ore. 448, 283 Pac. 18 (1929); City of Burlington v. Mayor of City of Burlington, 98 Vt. 383, 127 Atl. 892 (1925).

[6] Greenbanks v. Boutwell, 43 Vt. 207, 217 (1870).

religious meetings, lectures, concerts, dances, picnics, and other uses to which such halls are ordinarily put, then the district was doing what it had no lawful authority to do.[7]

Buildings for Different Races.—When a statute has delegated power to a board of school control to erect buildings, the board may build a schoolhouse for white, Negro, Indian, Mexican children, or children of other races even if there is a law forbidding segregation. The board must consider the greatest good to be accomplished, and it is expected to grant equal opportunity to each race.[8] On December 24, 1930, the Court of Civil Appeals of Texas stated that where the school board had segregated Mexican children and established testimony that separate housing and teaching of children of Spanish or Mexican descent was provided because the peculiarities of these children could be better taken care of in the grades by their being placed separately from children of Anglo-Saxon parentage, such separation was simply for the purpose of instructing that group according to its own particular needs.

This court cannot say that either reason given by the superintendent for the segregation complained of is unreasonable, if impartially applied to all pupils alike, or that it does not evince a careful study of the practical problem confronting him, or a sincere effort to solve that problem in such manner as to secure the greatest benefits to the school children of the district.[9]

Lease of Land or Title in Fee.—In some states discretionary power to select sites does not give a board power to erect a frame schoolhouse on any site for which it has no title or a lease for fifty years, without the provision that it will remove the schoolhouse when lawfully directed to do so by qualified voters of the district. Likewise, in some states in order to construct a brick or stone building for a school, the board must own the land in fee simple or have a ninety-nine-year lease.[10]

TAXES FOR BUILDING PURPOSES

Building without Levy.—Regardless of economic or physical conditions, a board of school control is sometimes given power to expend an amount not to exceed a certain specified sum for securing a site, building or equipping a schoolhouse, or repairing or

[7] *Ibid.*

[8] Messer v. Smathers, 213 N. C. 183, 195 S. E. 376 (1938); Board of Education of Kingfisher v. Board of Commissioners, 14 Okla. 322, 78 Pac. 455 (1904).

[9] Independent School Dist. v. Salvatierra, 33 S. W. 2d 790, 795 (Tex. Civ. App. 1930).

[10] School Dist. No. 5 of Delhi v. Everett, 52 Mich. 314, 17 N. W. 926 (1883).

improving any school building or grounds, without an additional election or a tax levy. When this is allowed, no action can bar the procedure unless an abuse of discretion is proved. In one case in Iowa the consolidation of districts caused an overflow of pupils, and the board built a temporary building out of funds on hand from money previously unexpended. The Supreme Court of Iowa in 1922 ruled as follows:

It is not only within its power but its duty, to "provide a suitable building" for a "central school," and within the maximum of $2000 it may "secure a site," or "build" or "equip" a schoolhouse, or "repair" or "improve" any building or grounds . . . why may not the board meet the need and perform its duty . . . without the calling of an election or levying a tax, so long as the cost of such improvement does not exceed the specified limit?[11]

Contract upon Basis of Levy.—A board is within its rights to accept a bid for building even though the money to be paid to the contractor is not in the treasury when the contract is made. Since there is no difference in law between money levied and collected for building and that to be levied and collected for building, the board has the discretionary right to contract upon the basis of the levy before the taxes are collected, provided it does not exceed the amount of money on hand and the amount to be derived from a levy of taxes to be made by the county commissioners for the current fiscal year.[12]

Extra Levy for Building Purposes.—A board has the right to levy a special tax for the completion of a school building. If when a school board has a building project in progress the funds are exhausted, the district is not precluded from using its discretionary power to levy a tax within the prescribed limits of taxation to complete the building, provided that the erection of the building was authorized at a regular election and no limit was placed upon the cost. The levying of the special tax does not create an indebtedness against the district. In 1906 the Supreme Court of Illinois ruled:

Even if it be conceded that the . . . bonded indebtedness brought the school district's debt up to the constitutional limit, still we fail to see how the levying of this tax for building purposes can be said to be an addition to the indebtedness of the district. The levying of a tax by the proper municipal authorities is not contracting municipal indebtedness.[13]

[11] James v. Consolidated Independent Dist. of Stanley, 194 Iowa 1224, 191 N. W. 60, 62 (1922).

[12] Gaddis v. Lincoln School Dist., 92 Neb. 701, 139 N. W. 280 (1912).

[13] People *ex rel.* Trobaugh v. Chicago & T. R. Co., 223 Ill. 448, 79 N. E. 151, 153 (1906); Hartman v. Pesotum Community Consolidated School Dist. No. 52, 325 Ill. 268, 156 N. E. 283 (1927); People *ex rel.* Biebinger v. Peoria & E. Ry., 216 Ill. 221, 74 N. E. 734 (1905).

In other words, if a district has a right under statute to raise the money to pay for a school building, and if it has exhausted its power to borrow money, it may use its delegated authority to levy taxes to the statutory limit for completing its building program. The bonded indebtedness is not increased, because the money is actually obtained and paid out without the issuance of bonds.

Special Building Fund.—If statutes do not prohibit, a school board may add money derived from taxation to money obtained from issuing bonds voted for building purposes in order to pay for the erection of school buildings;[14] but money collected for a special building fund may not be appropriated for the general expense of maintaining the school district.[15]

LOANS FOR BUILDING PURPOSES

In some jurisdictions a board of school control has the right to borrow money from the state literary fund for building purposes without first getting a majority vote of qualified voters to contract the debt, since the constitutional provision requiring a majority vote of qualified voters to contract a debt has no application to literary fund loans to local school boards. A Virginia court held that the state board of education has supervisory control over the fund, and the board, being invested with a discretion as to whether the loan should be made, could refuse to make the loan if it considered conditions to be so bad in the district desiring the loan that further debt should not be incurred. The decision of the Supreme Court of Appeals in Virginia, January 16, 1931, was that

> The county and city school boards . . . are expressly granted the authority to borrow from the literary fund, provided they make a formal application setting forth certain information. . . . It is quite significant that in making a loan of this kind the propriety of making it is left entirely to the judgment and discretion of the state board of education and the local school board.[16]

CHARACTER AND COST OF BUILDING

Type and Cost of Proposed Building.—Where there has been an election authorizing the erection of a proposed building and the issue of bonds, and no limitation is placed on the school board by a vote of the people as to the kind, character, and cost of the building, the school board has the right to use its own judgment as to the building which will be adequate and proper for the use of the district; if additional funds are necessary to complete such

[14] Gaddis v. Lincoln School Dist., 92 Neb. 701, 139 N. W. 280 (1912).

[15] Oklahoma County Excise Board v. Kuhn, 85 P. 2d 291 (Okla. 1938).

[16] Board of Supervisors of King and Queen County v. Cox, 155 Va. 687, 156 S. E. 755, 758 (1931).

a building, the board may levy taxes for its completion, providing such levies do not exceed statutory limitations. The Supreme Court of Illinois declared in 1927:

This court has frequently held that, where no limitation has been placed upon a school board by the vote of the people, it has the right to use its discretion as to the character and cost of a school building which shall be adequate and proper for the use of the district. Where the people have voted to build a school building, and have authorized the issuing of bonds for that purpose, the school board has the right to make tax levies, within statutory limits, to complete the building, if additional funds are required.[17]

Combination Units.—If circumstances require the erection of both an elementary building and a high-school building, a junior-high-school building and a high-school building, or whatever is necessary to take care of the needs of the educational situation, a board has discretionary power to build combination units with the schools together, or any other kind of division or combination it believes to be for the best interest of the people of the district, so long as the program is carried on in good faith.[18]

Selection of Material for Building.—It is within the power of a board of school control to decide just what materials it shall use in the construction of a building. Such discretion is not surrendered by a submission to voters of the question of indebtedness incurred; but when the determination of the cost of the building has been given to the voters, the board has no power to increase the cost passed upon by the voters. Therefore the board must be guided in the selection of the materials to the extent that the cost of materials will not exceed the limitations of expenditures passed upon by the voters.[19]

LIMITATION AND SURPLUS OF COST

Limitation of Cost.—The power to build a schoolhouse out of funds provided for that purpose by a board of school control or by a school district does not confer the power to go beyond the tax or bonded money for the specified purpose when a limitation has been placed on the board, and it cannot make the extra

[17] Hartman v. Pesotum Community Consolidated School Dist. No. 52, 325 Ill. 268, 156 N. E. 283, 288 (1927); Bohn v. Stubblefield, 238 Ill. App. 453 (1925); Lee v. Board of Education, 234 Ill. App. 141 (1924); People *ex rel.* Salm v. Scott, 300 Ill. 290, 133 N. E. 299 (1921).

[18] Flora v. Brown, 79 Ind. App. 454, 138 N. E. 767 (1923); Smith v. State *ex rel.* Shepard, 187 Ind. 593, 120 N. E. 660 (1918).

[19] Knaack v. Township of Black Hawk, 179 Iowa 410, 161 N. W. 446 (1917); Boll v. City of Ludlow, 234 Ky. 812, 29 S. W. 2d 547 (1930); County Board of Education of Warren County v. Durham, 198 Ky. 733, 249 S. W. 1028 (1923).

cost a charge against the district.[20] The Supreme Court of Montana, when considering the extent and character of the power invested in a board of trustees and the duty imposed by statute, stated:

> It [the statute] must, therefore, be regarded, not only as a grant of power to such boards, but also as a limitation upon their power, both as to its extent and as to the mode of its exercise. This is the rule of construction applicable to all statutes granting and defining the powers of such municipal or quasi municipal bodies.[21]

Surplus above Amount Voted in Bond Issue.—The board need not expend the entire sum voted in a special tax or school bond issue. The board has discretionary power to construct smaller buildings and to purchase less expensive equipment than was first contemplated, and thereby obtain a surplus above the amount voted. No action can be had to compel the board to spend the entire amount, and where there is no evidence of misappropriation of the funds, the court will not take cognizance of any complaint of taxpayers or patrons of the district. When a city in Illinois levied a tax for the building and equipping of a school building and did not specify the cost of the building, the court ruled:

> It is suggested by counsel for appellees that the real purpose of the board of education in making this levy . . . was to equip the school building with furniture, appliances, and apparatus necessary to complete the building and prepare it for the use of the school. There is no evidence in the record that there is any intention to misappropriate any portion of this levy.[22]

CONTRACTS FOR BUILDING

Contracts for Construction of School Buildings.—The legislature makes provision for district boards, school committees, school districts, or townships to make contracts in their respective capacities.[23] A board of school control has no right to enter into a contract which is not expressly or impliedly authorized by a statute.[24] If authorized to make contracts by statute, however, a

[20] School Dist. No. 35 of Sherman County v. Randolph, 57 Neb. 546, 77 N. W. 1073 (1899); Gehling v. School Dist. No. 57, 10 Neb. 239, 4 N. W. 1023 (1880); Nevil v. Clifford, 63 Wis. 435, 24 N. W. 65 (1885).

[21] State *ex rel.* Bean v. Lyons, 37 Mont. 354, 96 Pac. 922, 924-925 (1908).

[22] People *ex rel.* Trobaugh v. Chicago & T. R. Co., 223 Ill. 448, 79 N. E. 151, 153 (1906); Knaack v. School Township of Black Hawk, 179 Iowa 410, 161 N. W. 446 (1917); Boll v. City of Ludlow, 234 Ky. 812, 29 S. W. 2d 547 (1930).

[23] Third School Dist. in Stoughton v. Atherton, 53 Mass. 105 (1846).

[24] Board of School Commissioners of Indianapolis v. State *ex rel.* Wolfolk, 199 N. E. 569 (Ind. 1936); Snoddy v. Wabash School Township, 17 Ind. App. 284, 46 N. E. 588 (1897).

board of school control cannot be deprived of this discretionary power by the inhabitants of a municipality, and contracts entered into by the board for building purposes are binding upon the school district.[25] Courts will not grant a writ of injunction restraining the erection of a building which the board believes should be constructed unless there is an abuse of discretionary power on the part of the board.[26]

Modifying a Contract.—Where at the time a contract was entered into for the construction of a school building the contract exceeded the powers of the board of school control to make, and where by mutual agreement the contract was subsequently modified so as to bring it within the authority of the board, the modified contract should not be enjoined upon the ground that it was not within the power of the board to modify.[27]

Bids for Erection of Schoolhouse.—It is not mandatory upon a board to accept the lowest bid. Where the lowest bidder fails to comply with conditions requiring specified conditions to be included in a bid, a board has discretionary power to accept a higher bid. Mitigating influences may in many ways cause a low bid financially to be higher than another bid if inferior materials, type of work, or other goods or services are indicated. A board of school control may make reasonable requirements to be observed by the bidder. For example, the board in Wilmington, Delaware, makes it a requirement for the submitters of bids that subcontractors must be Delaware citizens; but on one occasion the low bidder failed to abide by the ruling. The court ruled that the board had a right to throw out the bid if the low bidder, failing to abide by the ruling, did not thereby save expense.[28]

Rejecting All Bids.—It is generally believed by laymen that when the time set to receive bids for a contract expires, no more bids may be received. This, however, is a mistaken idea. It is the duty of the board to investigate the character and responsibility of all bidders, and it has the right in its discretion to reject every bid, to readvertise, and to accept bids that come in later than the time specified in the previous advertisement.[29]

Terms and Conditions of Bids.—The board of school control has the same right to reject or accept bids as any private indi-

[25] Snoddy v. Wabash School Township, 17 Ind. App. 284, 46 N. E. 588 (1897).

[26] Millard v. Board of Education, 121 Ill. 297, 10 N. E. 669 (1887).

[27] Gaddis v. Lincoln School Dist., 92 Neb. 701, 139 N. W. 280 (1912).

[28] Ebbeson v. Board of Public Education in Wilmington, 18 Del. Ch. 37, 156 Atl. 286 (1931).

[29] Kerr v. Central Board of Education, 25 PITTSB. LEG. J. (N. S.) 54 (Pa. 1890).

vidual, but cannot change the terms of the bids. A Pennsylvania court said:

> Private negotiations between a director and a successful bidder through which the terms and conditions of the competitive bids are modified or changed, resulting either to the advantage or disadvantage of the city, are not within the spirit and purpose of the law.[30]

Rescinding a Contract.—Awarding a contract to the lowest bidder or to any other bidder does not constitute a contract until executed and delivered in conformity with the school board's action. Until this is done the board may rescind its action if it so desires.[31]

Changing the Time of Erection.—After bids have been given and accepted and the contract entered into between a contractor and a board of school control, the construction of the building shall begin at the time specified in the contract; however, the board has discretionary power to enter into a mutual agreement with the contractor to start building at a time different from that specified in the contract.[32]

INSURANCE OF BUILDING

Implied Power to Insure.—Even though the statute of a state's laws may not specify that a board of school control has power to insure a school building against a loss by fire or against destruction by the elements, the power seems to be implied from the control given to a school board to manage and care for school property. A Pennsylvania court ruled that under a statutory provision placing upon trustees the duty of caring for and managing the school property the board of school control has implied authority in its exercise of discretion to make reasonable expenditures from school revenue for procuring insurance on school property.[33] The purchase of insurance is not regarded as a loan of credit to a private corporation or as a liability for debts.[34]

Freedom of Choice of Association.—When a statute authorizes a board of school control, either by implication or by express authorization, to insure property, the board may use its discretion as to the character of the company it may select to insure the building. School property under such conditions may be insured

[30] Louchheim v. Philadelphia, 218 Pa. 100, 66 Atl. 1121, 1122 (1907).

[31] Commonwealth *ex rel.* Ricapito v. School Dist. of Bethlehem, 25 A. 2d 786 (Pa. Super. 1942).

[32] Sheldon v. Centre School Dist., 25 Conn. 224 (1856).

[33] Hagan Lumber Co. v. Duryea School Dist., 277 Pa. 345, 121 Atl. 107 (1923).

[34] Dalzell v. Bourbon County Board of Education, 193 Ky. 171, 235 S. W. 360 (1921); Fuller v. Lockhart, 209 N. C. 61, 182 S. E. 733 (1935).

in a mutual, co-operative, or assessment association, where no fixed premium is charged but the losses prorated among the members, provided the state licenses such companies or permits them to do business within the state borders. A Kentucky court held:

It is necessarily implied that the power is bestowed upon the board of education to determine for itself against what casualties it will insure and the amount of risks, the specific buildings and property that it will contract to be insured, the insurance corporation that it will contract with, and the details of the contracts. Included in these powers by implication, it would seem that the board of education is authorized to contract for insurance with any insurance corporation which the public policy of the state has by statute authorized to do an insurance business of the character of insuring public school buildings against fire and other casualties.[35]

LEGAL PROVISIONS CONCERNING SALE OF PLANT

Constitutional and Statutory Provisions for Sale of School Property.—Frequently constitutional and statutory provisions give broad powers to a board of school control to dispose of a school plant. These provisions vary greatly in different states. Some statutes limit the authority of the board to sell property outright. The Supreme Court of Illinois in 1888 gave the following interpretation of that state's statute regulating the sale of land by the school board:

The powers and duties the board may exercise independently of the city council relate mostly to furnishing schoolhouses, the employing of teachers, and the management of the schools generally. But all school property and funds are placed in and under the care of the city council or some city officer. There is no pretense there is any express provision by law that authorizes the board of education to take to itself the conveyance of any real estate for the purpose of holding the title as an actual owner might do. . . . As respects the sale of real estate held for school purposes, the statute is so plain it admits of no other construction: *First,* the sale must be made by the city council; and, *second,* it must be made by the council upon the written request of the board of education.[36]

In other states the statutes are more liberal and allow school authorities the right to sell the property whenever in the judgment of the board it is no longer useful as school property and to use the proceeds to erect or maintain schools.[37]

[35] Dalzell v. Bourbon County Board of Education, 193 Ky. 171, 235 S. W. 360, 362 (1921).

[36] People *ex rel.* Neal v. Roche, 124 Ill. 9, 14 N. E. 701, 703 (1888).

[37] Wells v. Pressy, 105 Mo. 164, 16 S. W. 670 (1891); Lowery v. Board of Graded School Trustees, 140 N. C. 33, 52 S. E. 267 (1905); M'Cullough v. School Directors of Fourth Ward, 11 Pa. 476 (1849).

SUMMARY

1. Any authority, power, or duty which a school district or board may have for providing buildings or constructing them is regulated by statute and is ministerial in character.

2. Some statutes provide specific regulations for the construction of school buildings as to modern, scientific plan and structure.

3. Where a constitutional limitation restricts further indebtedness of a district, a statutory regulation requiring the establishment of a school building under certain circumstances must be interpreted with consideration of both laws.

4. Such additional buildings as gymnasiums, workshops, and auditoriums may be considered necessary in the building of a school; unless limited by statute or a vote of electors, the board may use its discretion in building whatever parts of a school plant it deems best for the welfare of the community.

5. A board of school control is within its rights if it chooses to build separate schools for different races, regardless of segregation laws, so long as it does not abuse its discretion.

6. In some states statutes require that the school board have a title to or lease on school sites in order to build thereon schoolhouses of a certain construction.

7. In some cases school boards are permitted to build schoolhouses without a vote of the people if funds for the building are on hand.

8. School boards have the right to contract for the erection of a school upon the basis of tax levy for building purposes, since there is no difference between money in the treasury and money to be collected from the tax levy.

9. If no limitation is placed upon the cost of a building, a board has the right to levy a special tax for the completion of a school building even if it has exhausted its power to borrow money, since by the levy of the special tax no bonds are issued and the bonded indebtedness of the district is not increased.

10. According to statute a board may sometimes add money in the general maintenance fund to a special building fund, but may not use money in a special building fund for general purposes in maintaining the school district.

11. In some jurisdictions a board of school control may borrow money from the state literary fund for building purposes without a vote of the people to contract additional debt.

12. Where no limit is placed on the cost of a building by a vote of the people, the board may use its own judgment as to the kind, character, and cost of a building and, if necessary, levy

taxes to the constitutional limit to supplement the money derived from the sale of bonds.

13. Combination units or divisions of schools are permissible if the board uses its discretion in good faith for the benefit of the people.

14. A school board may use its discretion in the choice of building materials for a school provided it does not exceed any cost limitation which may be passed upon by the voters.

15. When a limitation has been placed on the cost of a building by the voters, the board may not exceed the tax or bonded money collected in the building fund.

16. A board does not necessarily have to expend all the money voted in a special tax or school bond issue for building a school, but may use the surplus for equipping the building unless the cost of the building is specified in the vote.

17. When boards of school control are authorized by statute to make contracts, whatever building contracts they enter into are binding upon the districts.

18. Where a board exceeded its powers in entering into a building contract but subsequently changed the terms with the mutual agreement of the contractor so as to bring the contract within its authority, the modified contract was legal.

19. It is not mandatory upon a board to accept the lowest bid for a building if in its judgment the low bid does not fulfil its requirements or indicates a use of inferior materials or type of work.

20. A board may reject all bids for a building project and readvertise for new bids.

21. A board has the same right to accept or reject bids as any private individual, but may not change the terms of bids.

22. A board may rescind a contract at any time before it is executed and delivered in conformity with the board's action.

23. The board has discretionary power to enter into a mutual agreement with the contractor to start building at a time different from that specified in the contract.

24. As a general rule the board of school control has specified or implied power to insure school buildings.

25. When a board has specified or implied power to insure school buildings, it may use its discretion in choosing any type of insurance agency which is authorized to do business within the state.

26. The sale of a school plant is governed by statute.

CHAPTER VI

Powers of Boards of School Control to Maintain and Operate School Plants

MAINTENANCE AND OPERATION OF SCHOOLS

Power and Duty of School Districts and Boards.—A school district is a quasi corporation and as such, in accordance with law, has power to levy taxes to maintain and operate the school plant in its jurisdiction.[1] The power and duty of caring for, maintaining, and operating the plant in an efficient manner is usually vested by statute in certain local school boards or officers, such as a board or committee of school control, a board of trustees, a board of education, or a similar body, whatever its designation; and the discretionary power in this respect consists in the board's using its best judgment.[2]

Power of Board to Act as Judge of School Needs.—A board of school control is sole judge of the needs of a school for maintenance and operation. It should be conscious of the responsibility for maintenance and operation placed upon it and should see that the school plant is kept in as good a condition as when it was placed in its jurisdiction or custody. This, of course, means that the board must keep the building in good repair and pay for its operation a sum sufficient to employ labor of the right type chosen by the management.[3]

Under the terms of maintenance and operation a board must care for such needs of the school plant as repairs to the buildings, plumbing equipment, heating equipment, classroom furniture and equipment, or any repainting that it deems advisable. But the board is not empowered and has no discretionary power to remodel or improve the school plant under the terms of maintenance and operation. Such remodeling would come under capital outlay, which is an entirely different subject.

[1] Andrews v. Estes, 11 Me. 267 (1834); Township Board of Hamtramck v. Holihan, 46 Mich. 127, 8 N. W. 720 (1881); Adams v. Miles, 300 S. W. 211 (Tex. Civ. App. 1927); School Dist. No. 8 v. Arnold, 21 Wis. 665 (1867).

[2] State *ex rel.* Anderson v. Brand, 5 N. E. 2d 531 (Ind. 1937); Rapelye v. Van Sickler, 1 Edm. Sel. Cas. 175 (N. Y. 1845).

[3] Conklin v. School Dist. No. 37, 22 Kan. 521 (1878); Trustees of Common School-Dist. No. 1 v. Jamison, 12 Ky. Law Rep. 719, 15 S. W. 779 (1891); Davis v. Bradford School Dist., 4 Pa. Co. 656 (1854).

TAX RATE FOR MAINTENANCE AND OPERATION

Statutory Authorization for Taxes.—A board of school control is judge of the tax levy that should be put upon the school district for the purpose of maintenance and operation of a school plant. A fiscal court must make the levy demanded by the board, subject to statutory limits, where no bad faith or unreasonable judgment on the part of the board is shown and where there is no illogical item included in the budget.[4] Some jurisdictions in authorizing repairs to be made do not give to a board the right to expend more than has been designated for a certain specified purpose, but the board is nevertheless responsible for keeping the building in repair.[5] In every case, however, repairs are authorized to be made, and the board is usually given a free hand within limit to demand a tax levy sufficient for the upkeep and operation of the school plant. It was held in an Iowa court that contracts for the repairs of a schoolhouse and grounds are entirely under the control of a board of directors of a district township. These contracts are made payable out of the contingency fund, which may be levied without a vote of the electors of the district or of the subdistrict.[6]

Millage Fixed by Board of School Control.—The power of a board of county or city commissioners to levy a school tax for maintenance and operation does not include power to raise or lower the millage fixed by a board of school control. So long as the millage is within the prescribed limits of the constitution regarding indebtedness of the district, the board of school control may use its own discretion in setting the tax rate, and the county or city commissioners must levy taxes according to the school board's demand. The Supreme Court of Florida, December 18, 1931, ruled in one case that existing statutes did not authorize the county commissioners to revise the decision of the board of public instruction as to the millage required for the maintenance of the necessary common schools of the county, when the millage fixed by the school board was within the constitutional limits and the estimate included no illegal items, and that "the power to levy the school tax within the constitutional limits," which is given by the Tax Levy Act to the county commissioners, was not a power to raise or lower the millage fixed by the school board under statutory authority.[7]

[4] Madison County Board of Education v. Madison County Fiscal Court, 246 Ky. 201, 54 S. W. 2d 652 (1932).

[5] Conklin v. School Dist. No. 337, 22 Kan. 521 (1878).

[6] Williams v. Peinny, 25 Iowa 436 (1868).

[7] Bervaldi v. State, 103 Fla. 902, 138 So. 380, 381 (1931); Tomasello v. Board of Public Instruction, 55 Fla. 341, 45 So. 886 (1908); State *ex rel.* Board of Public Instruction v. Board of County Commissioners, 17 Fla. 418 (1880); Jones v. State *ex rel.* Board of Public Instruction, 17 Fla. 411 (1880).

APPORTIONMENT OF FUNDS

Freedom in Allocation.—Apportionment of county funds and of equalization funds is within the power of the board of school control. In the use of this authority the rights and conditions of the districts should be properly recognized. If a board of education makes wise use of its judgment in allocating apportionment, its acts cannot be reviewed by the courts. Therefore, if there are conditions in one district which cause a board to see that it would be wisdom to allocate a lesser or greater amount to that district than to another, the courts will usually hold the action of the board to be justified, unless there is evidence of abuse of the power so vested. In an Alabama case the Supreme Court of Alabama, March 31, 1932, held that

> in making such apportionment the county board exercised a wide discretion, not reviewable by the courts, except for abuse; that such delicate and responsible duties were judicial in their nature, and that mere error of judgment did not call into exercise a review by the courts.[8]

Likewise, when a Georgia board distributed its funds upon several conditions in the public schools under its jurisdiction and not upon mathematical division, a Georgia court ruled that the board had constitutional rights to do so:

> The language of the Constitution is that the sum raised "shall be distributed equitably according to the school population, tax values, number of teachers and their grade of license, among the public schools therein." . . . This Constitution provides that the county board of education shall distribute the moneys arising for educational purposes therein contemplated "equitably according," not to one measure, but to the school population, tax values, the number of teachers and their grade of license.[9]

POWERS OF MANAGEMENT

Right of Protection against Disturbances.—Inasmuch as a board of school control is the guardian of the school and school district, the courts have held that a board has charge and possession of the school property in the school district,[10] or control and

[8] Harmon v. Ide, 224 Ala. 414, 140 So. 418, 419 (1932); State *ex rel.* King v. County Board of Education, 214 Ala. 620, 108 So. 588 (1926).

[9] Pearce v. Wisdom, 175 Ga. 663, 165 S. E. 574, 575 (1932); Meadows v. Board of Education, 136 Ga. 153, 71 S. E. 146 (1911); Gustafson v. Wethersfield Township High School Dist. 191, 319 Ill. App. 255, 49 N. E. 2d 311 (1943); School City of East Chicago v. Sigler, 36 N. E. 2d 760 (Ind. 1941); Galloway v. School Dist. of Borough of Prospect Park, 331 Pa. 48, 200 Atl. 99 (1938); Blair v. Board of Trustees, 161 S. W. 2d 1030 (Tex. Civ. App. 1942).

[10] Culver v. Smart, 1 Ind. 65 (1848).

supervision over the school property in the school district.[11] Although the right of control and management does not invest the board with the same power that it would have with individual property, the board does have the right to protect itself and to guard the schools against disturbances and annoyances which would interfere with the successful operation of the school or the unhampered prosecution of the purposes for which the public schools are established. A Pennsylvania court ruled:

> The school authorities, of course, have a right to protect themselves and their school from disturbance and annoyances that interfere with the successful prosecution of the purpose for which they are established.
>
> They would have a right to exclude from their grounds and buildings any man who would enter them to disturb the peace, or break up the order, or interfere with the legitimate exercises of the school.[12]

A Case of Management Contested.—The courts have almost uniformly held that the management, control, and protection of school property is vested in the board of school control, and that the power will not be reviewable except through the existence of abuse. Conditions endangering the life of a child while at school, or upon his entering or leaving school, would be an illustration of an abuse of this power. In one case a fence was the cause for an indictment in which an irate parent claimed that the erection of a fence six feet high would make it more dangerous for his child and other children attending the school to enter and leave the campus because of increased contact with traffic on the streets at the several gates of the fence. The court ruled that the erection of the fence for the purposes of protecting school property, public morals, and the children attending the school was within the lawful exercise of discretion.[13]

RESTRICTED USES OF BUILDING

It has heretofore been stated in this study that a board of school control has a wide discretion in the management and operation of a school building, but its powers are circumscribed by statutory limitations and it has no power not delegated or implied by constitution or statute. Therefore school property under this limited power must be managed with care and wisdom. In conditions where statutory limitations permit the use of the building for nothing but school work and incidental uses consistent with school work, the board may not allow the building to be used for

[11] Baggerly v. Lee, 37 Ind. App. 139, 73 N. E. 921 (1905).

[12] Hughes v. Goodell, 3 PITTSB. R. 264, 266 (Pa. 1870).

[13] Nacogdoches Independent School Dist. v. Adams, 36 S. W. 2d 567 (Tex. Civ. App. 1931).

other purposes. Many jurisdictions allow the board of school control to use its own discretion as to what uses shall be made and what uses shall not be made of the school plant, so long as regular school work is not interfered with. If the school officers exceed their authority in granting unauthorized uses of the school buildings, however, an injunction may be issued to prevent the illegal use.[14]

Use of Building for Special Subjects.—Special subjects, such as art, manual training, woodwork, home economics, agriculture, music, and so forth, as well as adult education, are consistent with modern education; and modern schools are including these subjects in their regular curricula. School buildings of the future will more and more take these subjects into consideration, even though they are classed as extras and nonessentials by many who oppose modern education at the present. The educative process must transcend the limits of tradition and embrace all the educational influences which affect the individual during his school and educative life. The board should be able to use its judgment as to what subjects shall be taught and how the building may be used for the benefit of carrying on these subjects, provided it abides by statute.[15]

Use of Building for Special Activities.—Where there is no constitutional provision to the contrary, a board of school control may allow the use of a school plant for supervised recreation or educational activity, whether it be for student or adult benefit. The activities may include lyceums, athletics, dances, dramas, religious services, and so forth, just so long as everything is operated in an orderly and constructive manner.[16] Anything the board considers for the best interest of the community will be given great consideration by the court. If the board believes it would be for the best interest of the people to charge for the use of the building, then that should be done. Finally, the court will always decide in favor of the board if the board gives paramount consideration to the interest of the greatest number of people, so long as constitutional or statutory limitations are not exceeded.

Operation of Cafeteria and Supply Room.—The board of school control has the right to operate a cafeteria or a supply room in a school building, because the typical court rulings hold that

[14] Sugar v. City of Monroe, 108 La. 677, 32 So. 961 (1902); Shinn v. Board of Education, 39 W. Va. 497, 20 S. E. 604 (1894).

[15] Trustees of Common School-Dist. No. 1 v. Jamison, 12 KY. LAW REP. 719, 15 S. W. 779 (1891). See Albert Pinkevitch, *New Education in Soviet Russia* (John Day Company, 1929).

[16] Goodman v. Board of Education of San Francisco Unified School Dist., 120 P. 2d 665 (Cal. App. 1941); McClure v. Board of Education, 38 Cal. App. 500, 176 Pac. 711 (1918); Corey v. Bath, 35 N. H. 530 (1857); Beard v. Board of Education, 81 Utah 51, 16 P. 2d 900 (1932).

such a facility does not subserve a private mercantile purpose in any commercial competition with private restaurants or with merchants. It is rather a projected service whereby the student body is convenienced. In 1931 the Court of Civil Appeals of Texas bore out this idea as follows:

It is apparent from the record that the establishment and maintenance of the cafeteria by the school board does not subserve a private mercantile purpose in any commercial competition with private restaurants, but is conducted for the student body . . . and for reasons which concern their welfare as students of that school. The cafeteria is a necessary convenience, and is not obnoxious to any Constitutional or statutory inhibitions, and, we think, a reasonable exercise of the discretionary power conferred by law upon the board of trustees.[17]

CONDEMNATION OF SCHOOL PLANT

Safeguarding the Children.—When a statutory provision allows a school board discretionary power to condemn a school building when it is dilapidated, the board may exercise its decision as to the erection of another building. The children should be safeguarded against the possibility of being injured through negligence of the board in not caring for a building or not condemning a building after it has become dangerous. A Kentucky Court of Appeals, January 17, 1891, stated:

It is made the duty (under the school law of the state) of the superintendent to condemn dilapidated school buildings when unfit for the uses designed, and when this is done, and the trustees notified by the superintendent, it becomes their duty to have the old one repaired, or a new building erected.[18]

DISCONTINUING USE OF PROPERTY

Wide Discretion of Board.—In the absence of positive statute to the contrary, a board through implication has discretionary power to discontinue the use of any school property that is not considered to be valuable. A school in a ward or district may be discontinued if a board deems the discontinuance to be the best and greatest advantage for the most taxpayers concerned.[19] The declaration from the Kansas City Court of Appeals, February 1, 1932, is:

The power of the board of a city, town, or consolidated school district, to establish ward schools carries with it, or necessarily implies, the power to abandon schools no longer required.[20]

[17] Bozeman v. Morrow, 34 S. W. 2d 654, 656-657 (Tex. Civ. App. 1931); Goodman v. School Dist. No. 1, 32 F. 2d 586 (C. C. A. Colo. 1929).

[18] Trustees of Common School-Dist. No. 1 v. Jamison, 12 KY. LAW REP. 719, 15 S. W. 1, 2 (1891).

[19] *Ibid.*

[20] Corley v. Montgomery, 226 Mo. App. 795, 46 S. W. 2d 283, 289 (1932); Crist v. Rayne Township School Dist., 21 A. 2d 417 (Pa. Super. 1941).

SUMMARY

1. A school district as a quasi corporation has power to levy taxes to maintain and operate the school plant within its jurisdiction, and the school board is usually given discretionary power to care for, maintain, and operate the school plant.

2. A board of school control is judge of the needs of the school plant and must expend a sum sufficient to maintain the school in continuously good condition.

3. The board of school control is judge of the tax levy that should be put upon the school district for maintenance and operation of school plants, and a fiscal court must levy the tax demanded by the school board provided the board abides by statutory limitations and exercises its power with discretion.

4. So long as a school board fixes millage within constitutional limit regarding indebtedness of the district, the county or city commissioners must levy a school tax for maintenance and operation without raising or lowering that millage.

5. Apportionment of county and equalization funds among public schools for maintenance and operation is within the discretionary power of a board of school control, and unless the board abuses its discretion it may distribute the funds according to its own standards of apportionment.

6. As guardian of the school and school district, the board of school control has charge and possession or control and supervision of the school property and has a right to protect the schools within its jurisdiction from disturbances and annoyances.

7. Management, control, and protection of school property is vested in the school board, and it must not allow any circumstance which would endanger the safety of the children attending a school.

8. A board of school control has wide discretion in the management and operation of a school building, and except where statutory limitations forbid, it may allow the use of the school building for special subjects and activities outside of the regular academic schedule or for the operation of a school cafeteria and supply room, charging for the use of the building or not according to its best judgment.

9. When statute allows a school board to condemn a building if it is no longer safe, the school board may be charged with negligence if it does not prevent possible injury to children and teachers by condemning a dangerous or dilapidated building.

10. It is usually implied by statute that a school board has a right to discontinue the use of any school property not needed by the district.

CHAPTER VII

Powers of Boards of School Control in the Administration and Supervision of Schools

GENERAL POWERS

A LEGISLATURE creates a board of school control and gives to it the right to control and manage the schools, since the legislature itself could not possibly carry on effectively the work of education without delegating some of its powers to an agency to act in its stead.[1] A board of school control thus has full authority and such discretionary power as may be implied from the commands or statutes of the state legislature or general assembly in the administration and supervision of schools, unless constitutional provision determines otherwise, provided that the board's acts are honest, its judgment clear, and its interest paramount for the greatest number of taxpayers.[2]

Capacity to Acquire and to Hold Property.—The power to acquire and to hold property for school purposes is expressly conferred, and a board has such discretionary power as will enable it to carry out the purpose for which it was created, that is, for the supervision and administration of the educational policies which the state shall adopt.[3] All public schools and school property are under the direction and control of a board of school control. Some state courts have held that a school district or board of education has no authority to acquire and to hold real property for any purpose other than as a school site for school use. An Iowa court, for instance, stated:

No authority is given to a school district to acquire real property, and hold it for any other purpose than as a site for a schoolhouse, nor can the board bind the district to pay for property acquired and held for

[1] Hassett v. Carroll, 85 Conn. 23, 81 Atl. 1013 (1911).

[2] Associated Schools of Independent Dist. No. 63 v. School Dist. No. 83, 142 N. W. 325 (Minn. 1913); Commonwealth v. Hartman, 17 Pa. 118 (1851); Board of School Commissioners of Indianapolis v. State *ex rel.* Sander, 129 Ind. 14, 28 N. E. 61 (1891); High-School Dist. No. 137, of Havelock v. Lancaster County, 60 Neb. 147, 82 N. W. 380 (1900); Board of Education of Sauk Creek Centre v. Moore, 17 Minn. 412 (1871).

[3] Niles v. Board of Education, 70 N. J. L. 1, 56 Atl. 312 (1903).

any other purpose. Code, §2743, authorizes school districts to hold property for the purposes for which property may be acquired, and they are only those specified by statute.[4]

Implied and Conferred Powers.—In delegating authority to a board of school control, the legislature usually leaves a wide discretion to the board in using its judgment, fairness, and common sense; its decisions would not be controlled by court unless there should be an abuse of power. The legislature usually makes it plain that a board of school control is to be left free to carry out all the purposes for which it is created; necessarily some powers which are not specifically conferred are implied. A decision of the Supreme Court of Illinois in 1908 was that

> The power of the board of education to control and manage the schools and to adopt rules and regulations necessary for that purpose is ample and full. The rules and by-laws necessary to a proper conduct and management of the schools are, and must necessarily be, left to the discretion of the board, and its acts will not be interfered with nor set aside by the courts, unless there is a clear abuse of the power and discretion conferred.[5]

LIMITATION OF POWERS

A board of school control is limited in its powers to act. There can be no action that in any way conflicts with the constitutional or statutory provision. All its powers are either directly delegated or implied, so that there is wide discretion in the activities of the board outside of direct statutory provision. The typical view towards the board's limited powers is:

> The board of education, being a creation of the Legislature, has only such powers as are expressly conferred upon it and such implied powers as are necessary to execute and carry into effect its express powers.[6]

A first-class district or any other kind of public-school district that is a corporate body is an agency of state government with limited powers exclusively restricted to purposes of education. The Utah Supreme Court in 1932 declared that according to statute

> it is provided that . . . the board may "do all things needful for the maintenance, prosperity, and success of the schools, and for the pro-

[4] Independent School Dist. v. McClure, 136 Iowa 122, 113 N. W. 554 (1907).

[5] Wilson v. Board of Education, 137 Ill. App. 187 (1907), *aff'd*, 233 Ill. 464, 84 N. E. 697, 698 (1908); State *ex rel.* King v. County Board of Education, 214 Ala. 620, 108 So. 588 (1926); Christian v. Jones, 211 Ala. 161, 100 So. 99 (1924); State *ex rel.* Davis v. Curtis, 210 Ala. 1, 97 So. 291 (1923); Armstrong v. O'Neal, 176 Ala. 611, 58 So. 268 (1912); Taylor v. Kolb, 100 Ala. 603, 13 So. 779 (1893).

[6] Beard v. Board of Education, 81 Utah 51, 16 P. 2d 900, 903 (1932).

motion of education . . . and make and enforce all needful rules and regulations for the control and management of the public schools of the district."[7]

EXPENSES OF BOARD MEMBERS

Scope of Expenses.—Very wise direction must be used in the delegation of authority to a person to incur expense, if a board of school control should delegate authority at all. Expenses allowed by the board, which it may direct to be paid out of the school funds, must originate within the board; and the advisability of the allowance, as well as the amount thereof, must originate with the board. A Kentucky Court of Appeals decision, May 16, 1916, is as follows:

> It is apparent that in the matter of incurring and allowing expenses, the discretion of the members of the board should be consulted. This can only be done by the board authorizing the particular item of expense after its propriety shall have been determined and the amount fixed by the board before the expense has been incurred, and it should state the purpose for which the expense is to be incurred and the person to whom it is to be paid.[8]

Expense for Attendance at Convention.—The Supreme Court of New York State, Appellate Division, June 12, 1900, held that a board of school control is without discretionary power to defray expenses incurred by any of its members in attending a school convention such as the National Educational Association. The claim was made that the benefits derived were too indirect to justify the payment of expenses, even though a board may have authority to pay contingent expenses. Benefits derived were declared to be too remote to be classified as contingent to the welfare of the school. The court concluded:

> Where an expenditure is not directed to the support of the school system, where there is no palpable connection between the object to be attained thereby and the object for which the board exists, then it is unauthorized. The connection must be direct, as has been said; it must be clear; it cannot be merely fanciful, or one to be deduced by strained or far-fetched reasoning.[9]

Many leaders in education in America do not agree with the sentiment expressed by this court, and the trend is strongly away from this view. Certainly the members of school boards who control our schools should keep abreast of the current thinking of

[7] *Ibid.*
[8] Beauchamp v. Snider, 170 Ky. 220, 185 S. W. 868, 871 (1916).
[9] Wright v. Rosenbloom, 52 App. Div. 579, 66 N. Y. S. 165, 166 (1900).

teachers and administrators who attend professional conventions, and it is doubtful if other courts would uphold the above decision.

SUMMARY

1. A board of school control has full authority and such discretionary power as may be implied from the statutes of the state legislature in the administration and supervision of schools.

2. Statutes expressly confer upon boards of school control the power to acquire and hold property for school purposes, and boards have such discretionary power as will enable them to supervise and administer public schools and school property.

3. What powers in control and management of schools are not expressly conferred upon school boards may be implied in general statutes giving the board power to control and manage schools and to adopt and enforce rules and regulations necessary to administer schools, so long as there is no abuse of discretion.

4. The board is limited by statute to control over matters of education and has no implied or expressed authority to deal with other matters.

5. The propriety of expenses allowed by a board of school control must be determined, and the amount fixed, before the board may authorize the particular item of expense to be paid.

6. In 1900 the New York Supreme Court held that the board may not allow expenses for educational meetings and conventions, since the benefits derived by board members from such meetings are too remote to be classified as directly related to the welfare of the school; but today most courts would hold that board members should attend conventions and keep abreast of current educational administration.

CHAPTER VIII

Powers of Boards of School Control in Reference to Bonds

EXTENT OF POWERS

Illegality of Exceeding Taxable Property Value.—Wide judgment may be employed in the purchase of sites and in the planning of school buildings, but a board may not request a sum of money that will exceed the constitutional limit or the statutory limit. It has been held in a number of cases that the time when the bonds were sold, not the time of the election, is the controlling factor for whatever limits are set up. Although a vote for a bond issue is discretionary, if the people should vote for a bond issue in excess of the limits fixed by statute, only the excess is void, and bonds within constitutional and statutory limit may be issued. The Court of Appeals in Kentucky, June 30, 1930, stated:

. . . where the people vote for a bond issue in excess of the limit fixed by section 158 of the Constitution, only the excess is void.[1]

Right of Board to State What Is Needed.—Where a taxpayer complains that the amount of money requested by a board of school control and voted by the district is in excess of that which is necessary, the objection may be overruled on the ground that the school board of the district has the discretionary right to state what amount is needed and for what purpose it is needed, and that such a request must be granted within limitation of statutory provision. The court has not the power to interfere with such discretionary duties of the board. A Kentucky Court of Appeals, May 5, 1911, ruled:

. . . the allegation of the petition that only $900 is necessary is confined to the payment for the buildings, while the vote was taken upon the question of issuing bonds to the amount of $2,000 for the purpose

[1] Boll v. City of Ludlow, 234 Ky. 812, 29 S. W. 2d 547, 548 (1930); County Board of Education of Warren County v. Durham, 198 Ky. 733, 249 S. W. 1028 (1923); Moss v. City of Mayfield, 186 Ky. 330, 216 S. W. 842 (1919); McKinney v. Board of Trustees, 144 Ky. 85, 137 S. W. 839 (1911); Whalen v. Commonwealth, 110 Ky. 154, 61 S. W. 35 (1901); Levi v. City of Louisville, 97 Ky. 394, 30 S. W. 973 (1895); Gehling v. School Dist. No. 57, 10 Neb. 239, 4 N. W. 1023 (1880).

of providing grounds, a building, furniture, and apparatus for the conducting of the school. While it may be true that only $900 is needed to finish paying for the building, it may nevertheless be true that $2,000 is needed for the other purposes mentioned in the call for the election. The necessary and proper steps having been taken, we are of opinion that the bonds to the extent of $2,000 can be legally issued. . . .[2]

Liberty in Raising and Expending Funds.—The proceedings of a board of school control in raising and expending money cannot be lightly impeached and held void. In the opinion of a Vermont court less money than asked for would have been adequate for the immediate needs of the corporation, but these matters are discretionary and a difference of opinion is not an abuse of such privilege.[3] When a legislature has conferred upon the people of a school district the power of determining the amount of funds necessary to defray the expense of a school building program, it is likely that courts of justice will not interfere with the power unless that power has been manifestly abused.[4]

Joint Issue of Bonds by Board and City Council.—In some jurisdictions the school board must act jointly with the city councilmen in the issue and sale of bonds.[5]

Supplementing Bond Issues by Levy of Taxes.—The Supreme Court of Nebraska in 1912 held that to supplement the funds derived from bonds with those derived from taxes, when the amount derived from bonds is too small to carry on the necessary program, a board of school control has power to levy the tax rate required, so long as it does not exceed legal limitations.[6]

Bond Issues without Limit.—In some independent districts there is no statutory limit placed on the indebtedness the district may incur. Independent school districts of Indiana not located within cities having more than 50,000 inhabitants are granted power to vote bonds without limit; once the bonds are voted, it becomes the duty of the school board to levy a tax sufficient to meet the obligations thus incurred.[7]

Submission of Bond Issue to Voters.—When it becomes necessary to borrow money for special projects in connection with educational purposes, most jurisdictions leave to the discretion of

[2] Young v. Roberts, 143 Ky. 511, 136 S. W. 911, 912 (1911).

[3] Eddy v. Wilson, 43 Vt. 362 (1871).

[4] Sheldon v. Centre School Dist., 25 Conn. 224 (1856); Crabtree v. Board of Education of Durham County, 199 N. C. 645, 155 S. E. 550 (1930).

[5] Mathews v. City of Chicago, 342 Ill. 120, 174 N. E. 35 (1930).

[6] Gaddis v. Lincoln School Dist., 92 Neb. 701, 139 N. W. 280 (1912).

[7] Oliver Iron Mining Co. v. Independent School Dist. No. 35, 155 Minn. 400, 193 N. W. 949 (1923); Stinson v. Thorson, 34 N. D. 372, 158 N. W. 351 (1916).

the board of school control the question as to whether bonds should be issued or promissory notes taken in the name of the school district. In any case, the usual procedure requires that the board submit the issue to the taxpayers of the district or districts concerned to decide by vote whether the proposed project may be financed.

Determination of Kinds of Bonds.—Discretionary power is invested in school boards to decide the best policy to follow in issuing bonds and what kinds of bonds should be issued for a given situation, depending upon whether funds are to be raised to purchase a site, to construct a building, to add to a building, or to make repairs.[8]

Issuance of Bonds in Installments.—A school board after authorization of a bond issue has the right to issue bonds in installments, each of which may mature not more than a certain fixed time from the date of issuance.[9]

OFFERING BONDS FOR SALE

In 1917 a board of school control in Ohio declared that it was necessary to purchase a site, to erect a schoolhouse thereon, and to equip the building in order to provide the proper accommodations for the district's school purposes and that in order to carry out this project a bond election would have to be submitted to the electors of the district. The bond issue was submitted and carried. As a result certain taxpayers attempted to enjoin the board of school control from offering the bonds for sale. It was claimed by the taxpayers that the school district was already provided with adequate school facilities. The Ohio Supreme Court, April 29, 1919, very definitely clarified its position in respect to discretionary powers of boards to sell bonds once they were approved by a vote of the people:

> A court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of such board, upon any question it is authorized by law to determine.[10]

PAYMENT OF BOND ISSUES

Payment of Bonds before Maturity.—In some jurisdictions a board of school control has nothing to do with bonds after

[8] Woodson v. School Dist. No. 28, 127 Kan. 651, 274 Pac. 728 (1929); Board of Education of Hancock County v. Moorehead, 105 Ohio St. 237, 136 N. E. 913 (1922).

[9] State *ex rel.* School Dist. of Kansas City v. Thompson, 327 Mo. 144, 36 S. W. 2d 109 (1931); State *ex rel.* Clark County v. Hackmann, 280 Mo. 686, 218 S. W. 318 (1920).

[10] Brannon v. Board of Education, 99 Ohio St. 369, 124 N. E. 235 (1919); Robinson v. McDonald, 5 Ohio App. 376 (1916).

issuance, but instead the commissioner of the county or charter unit is invested with delegated power to determine how the bonds may be retired. In any case, however, a board is invested with authority to make contracts for paying bonds belonging to a permanent school fund before the maturity of the bonds; and the state treasurer must observe the board's terms in receiving payment for the bonds and delivering over all the bonds so paid. On May 4, 1932, the Court of Civil Appeals of Texas stated:

> . . . we agree with the appellee's contention that "the Board of Education and not the Treasurer, is vested with the authority and duty to make contracts for paying bonds before their maturity, and when such contract has been made, the Treasurer must observe its terms in receiving payment for, and delivering over the bonds so paid."[11]

Mortgages.—The board has the right to mortgage property of a district and pledge the revenues thereof as a security for payment of school bonds or notes. Against such instruments the district will have no defense which is not accorded an individual, by virtue of its capacity as a school district in law or in equity.[12]

Effect of Bond Issue when Territory Is Reduced.—Under certain statutes a board of school control has the right to call an election for a special school bond issue in a given territory. In Iowa a district had been reduced in size by the government, which had taken some of the territory for a military camp, and by the school board, which had ceded part of the district to a neighboring district; the district had thereby become too small to finance itself or to carry on school work successfully. In 1920 the Supreme Court of Iowa refused to interfere with the act of the board or to maintain any action by the taxpayers to compel the board to unite the district with another.[13]

Where the bonds are voted and the territory is thereafter reduced in size so that the number of acres of land and other property values subject to taxation become much less than the electors contemplated, the effect of the payment of the bond issue is not changed. In such a case the change in the situation will in no respect lessen the power of the board to levy the necessary taxes for the support of the district, even though it puts a much greater burden of taxation upon those who remain within the district.

SUMMARY

1. The board of school control may not issue bonds beyond the constitutional or statutory limit placed on taxable property

[11] State v. Hatcher, 52 S. W. 2d 794 (Tex. Civ. App. 1932).

[12] Connelly v. Earl Frazier Special School Dist., 170 Ark. 135, 279 S. W. 13 (1926).

[13] Hufford v. Herrold, 189 Iowa 853, 179 N. W. 53 (1920).

indebtedness, but if a bond issue voted for by the people is in excess of the limit of indebtedness the board may issue bonds up to the limit and declare void all bonded indebtedness beyond the limit without holding another election.

2. The board has discretionary power to state the needs of the district and request a bond issue to cover those needs, and taxpayers may not object that the bond issue is in excess of that which is necessary.

3. The board has broad discretionary powers both in raising and expending money for the benefit of the school district, and even if the sum of money requested in a bond issue be in excess of what is necessary, the court may not interfere with the action unless abuse of power is evidenced.

4. In some jurisdictions the school board must act jointly with the city council in the issue and sale of bonds.

5. In order to complete a special project, boards may sometimes supplement funds derived from bond sales by the levy of taxes.

6. In some independent districts there is no statutory limit placed upon the indebtedness which the district may incur.

7. The usual procedure for issuing bonds or signing notes requires that the board submit the question to the voters of the district or districts in which a proposed project is to be carried out.

8. The kind of bonds to be issued, depending on whether the money is to be used for the purchase of a site, the building or expansion of a school, or repairs to a school plant, is within the discretion of the board.

9. After the authorization of a bond issue the school board has a right to issue bonds in installments.

10. Once a bond issue is carried in a popular election, no taxpayer may enjoin the sale of bonds on the grounds that the proposed project is unnecessary.

11. Boards of school control may pay for bonds before their maturity, and the state treasurer must observe the board's terms and deliver over all the bonds so paid.

12. A board may mortgage school property and pledge the revenues thereof as security for payment of bonds or notes.

13. After a district has passed upon a bond issue and the district is for some reason reduced in size, a board of school control has the right to levy the necessary amount of taxes to pay for the bonds, even though a heavy burden is placed upon the people remaining in the district.

CHAPTER IX

Powers of Boards of School Control Concerning Superintendent

EMPLOYMENT OF SUPERINTENDENT

Selection of Superintendent.—A board of school control, unless limited by statute, has wide authority in the selection and employment of a superintendent of schools.[1] It may decide who is and who is not suitable, from the standpoint of morals, physical attractions, age, education, and whatever other qualifications it believes should be considered before employing an administrator for its schools. In this matter the judgment and discretion of the board cannot be called into question or inquired into by the courts.[2]

TERMS OF OFFICE OF SUPERINTENDENT

Determining the Duration of Superintendent's Employment.—Where there is not a statutory regulation stating definitely the length of office of a superintendent for each term he may serve under one election, a board of education may employ its judgment in setting the limits of the term of office; it is the privilege of the board to set one year, two years, or more for a term of office.

Employment of Superintendent beyond Life of Board.—In the absence of statutory limitation, a school board may enter into a contract with a superintendent for a term extending beyond the duration of its own term, and a succeeding board does not have authority to dismiss the superintendent for the time the contract is in force unless there should be sufficient cause. In *Reubelt v. School Town of Noblesville* a superintendent was employed by the board in May, 1885, to take office the following September. In June a new trustee was elected to the school board, as required

[1] School Dist. No. 1, Pitkin County v. Carson, 9 Colo. App. 6, 46 Pac. 846 (1896); Donald v. Stauffer, 140 Miss. 752, 106 So. 357 (1925).

[2] Goodwin v. State Board of Administration, 212 Ala. 453, 102 So. 718 (1925); Donald v. Stauffer, 140 Miss. 752, 106 So. 357 (1925); Rotenbury v. Board of Supervisors, 67 Miss. 470, 7 So. 211 (1890); State Board of Education v. City of West Point, 50 Miss. 638 (1874); Vicksburg v. Rainwater, 47 Miss. 547 (1872); State *ex rel.* Lewellen v. Smith, 49 Neb. 755, 69 N. W. 114 (1896); State *ex rel.* Sittler v. Board of Education, 18 N. M. 183, 135 Pac. 96 (1913); State *ex rel.* Reed v. Board of Education, 100 Wis. 455, 76 N. W. 351 (1898).

by statute, and after that the board repudiated the contract made with the superintendent. On May 24, 1886, the Supreme Court of Indiana stated the question involved and gave its decision as follows:

> The question, therefore, is not as to the authority of one board to bind a corporation by a contract to be performed after that board shall have ceased to exist, and another shall have been organized, but whether the board of school trustees can bind the school corporation by contracts which are not to be performed until after the time when a new member of the board is elected. . . .
>
> There is nothing in this grant of power to employ teachers and a superintendent which in any way limits the authority of the board of trustees to contracts that are to be performed during the existence of any particular organization of that body.[3]

SALARY OF SUPERINTENDENT

Setting the Salary.—Unless a board of school control resides in a district which is controlled by statutory regulations in the setting of the salary of a superintendent, the board may use its discretion as to what salary shall be paid. A board may take into consideration the training and experience of a superintendent or any other factor that may aid in the evaluation of the qualifications of a superintendent that would assist the board to know what would be a just salary.[4]

Status Quo of Salary.—When statutory provisions within a state allow a school board to use its judgment in setting the salary of a superintendent, and that salary has been set, or if the salary has been otherwise set by fiscal court, the board does not have discretionary power to increase or decrease that salary for the duration of the contract.[5]

EXPENSES OF SUPERINTENDENT

Legal Expenses.—A board of school control has broad powers in the determination of the kinds of expenses and the amount that should be allowed a superintendent. Before an expense is incurred, the particular item to which it applies, its propriety, its amount, and the purpose for which it is to be used should be determined by the board.[6]

[3] Reubelt v. School Town of Noblesville, 106 Ind. 428, 7 N. E. 206, 208 (1886); Gates v. School Dist., 53 Ark. 468, 14 S. W. 656 (1890); State *ex rel.* Brown v. Polk County, 54 S. W. 2d 714 (Tenn. 1932); Board of Education of Viola Normal School v. Board of Education of Warren County, 160 Tenn. 351, 24 S. W. 2d 889 (1930).

[4] Paquette v. City of Fall River, 278 Mass. 172, 179 N. E. 588 (1932); Leonard v. School Committee of Springfield, 241 Mass. 325, 135 N. E. 459 (1922).

[5] Beauchamp v. Snider, 170 Ky. 220, 185 S. W. 868 (1916).

[6] *Ibid.*

Expense Account Limited to County.—While wide authority is vested in a board to determine necessary expenses for the superintendent, it is concluded that no expenses should be allowed to the superintendent personally which are not actually and necessarily incurred within the county when the superintendent is in charge of his official duties. The Supreme Court of Kentucky stated in 1916:

> . . . we conclude that no expenses should be allowed to the superintendent personally, which are alleged to have been incurred by him in the discharge of his official duties, except those actually and necessarily incurred for that purpose; and they should be limited to expenses incurred in the county, and only while the superintendent is actually at work in the discharge of his official duties.[7]

Expenses for Educational Meeting.—A board of school control should use very wisely the discretionary power delegated by statutory enactments in the matter of expenses for a superintendent. Some jurisdictions allow expenses for a superintendent to attend educational conferences, but a Kentucky court has decided that expenses for attending an educational meeting outside the county and for membership fees to the educational association may not be justified, declaring that the interest of the schools is too remote and that the meeting is not within the territory directly connected with the schools.[8]

In states where the superintendent is permitted an expense account for attendance at educational conferences, it is held that the board of school control is the sole judge as to how money may be spent so long as it is used for educational purposes.

DUTIES OF COUNTY SUPERINTENDENT

Statutory and Administrative Duties.—When there is not a statutory provision delegating direct power to a superintendent of schools, a board of school control may delegate such power to the superintendent as in its discretion it believes to be just and right for the best interest of the administration and supervision of the schools, so long as the board does not exceed its limitations.

Teachers' Meetings.—A board would abuse its discretionary power if it should deny to a superintendent the privilege of holding a teachers' meeting in any designated classroom or other place, when a reasonable notice of such an intention is given by the superintendent. It is obvious that the interpretation of this implication must be acted upon with reasonable co-operation by both the board and the superintendent. The Supreme Court of Min-

[7] Beauchamp v. Snider, 170 Ky. 220, 185 S. W. 868, 870 (1916); Shelton v. State *ex rel.* Caldwell, 62 Okla. 105, 162 Pac. 224 (1917).

[8] *Ibid.*

nesota stated on July 15, 1898, that its interpretation of the statute regarding this subject was

> that the superintendent cannot arbitrarily and absolutely designate any school house or school room he see fits for the examination of teachers therein; but he has the right of selection in the first instance, and when the school officers receive notice of such selection, if there are good reasons why they cannot grant him the use of the particular room selected, they must set apart for him in a school house of the district a suitable and proper room, and such a one as his purposes reasonably require.[9]

DISMISSAL OF SUPERINTENDENT

Right to Dismiss Superintendent.—A school board has a wide discretion in the dismissal of a superintendent for a statutory cause, and this action is not reviewable by a court unless the board should act in an arbitrary, corrupt, or fraudulent manner. A board has a right to dismiss a superintendent if there is conclusive evidence that he is neglecting his duties or that he is a hindrance to the welfare of the school or community. In a case where a county superintendent failed to visit the schools within his jurisdiction, holding that he was too busy to make personal visits to the various schools under his administration and supervision, and the board discharged him for neglect of his duties, the court upheld the action of the board, refusing to allow "a county superintendent to substitute his ideas of what he should do for the mandates of the law."[10] There must be direct evidence of sufficient cause for dismissal, however, before a board may employ its right or privilege of dismissal during the time of the contract. A Kentucky Court of Appeals, March 28, 1924, declared:

> Where . . . an officer holds for a fixed term and is removable only for cause, it is essential to a valid removal that the charges be legally sufficient, that the incumbent have notice thereof and an opportunity to defend, and that there be some evidence tending to support the charges.[11]

A board has no power to determine arbitrarily whether the dismissal of a school superintendent is in the best interest of the schools. The action of dismissal must be based upon a justifiable charge that the superintendent has committed some act or has manifested some qualities which militate against his services in

[9] State *ex rel.* Covell v. Board of Education, 73 Minn. 375, 76 N. W. 43, 44 (1898).

[10] Howard v. Bell County Board of Education, 247 Ky. 586, 57 S. W. 2d 466, 467 (1933); Henderson v. Commonwealth, 199 Ky. 798, 251 S. W. 988 (1923).

[11] Henderson v. Lane, 202 Ky. 610, 260 S. W. 361, 362 (1924); Bowden v. Board of Education, 264 Ill. App. 1 (1931); School City of Elwood v. State, 203 Ind. 626, 180 N. E. 471 (1932); Howard v. Bell County Board of Education, 247 Ky. 586, 57 S. W. 2d 466 (1933).

the capacity of a school administrator, and the charge must be one that can be proved in court. Otherwise, the superintendent may collect for the amount of the contract, minus other wages that he may have earned during the time.[12]

SUMMARY

1. A board of school control has a wide discretion in the selection and employment of a superintendent of schools.

2. Unless there is statutory regulation to determine the term of office of a superintendent, the board has a broad discretion in the determination of the length of contract.

3. A board has the privilege of employing a superintendent for a term extending beyond that of the board.

4. Where there is no statutory specification as to a superintendent's salary, a board is vested with authority to determine the amount, within reason, that shall be paid the superintendent.

5. Once the salary of the superintendent is set, the school board does not have power to raise or lower it for the duration of the contract.

6. A board has power to determine what expenses should be allowed a superintendent, and it may raise his expense allotment if necessary.

7. All expenses of a superintendent must pertain to his official duties carried on within the district where he works.

8. Even though a board has a wide discretion in the determination of expense items, in some jurisdictions it may not defray any expense a superintendent incurs in attending an educational meeting.

9. The board may delegate to the superintendent such duties as it deems necessary for the efficient administration and supervision of the school, so long as statutory limitations are not exceeded.

10. A board may not deny to a superintendent the privilege of holding a teachers' meeting in a designated classroom or other room in a school building.

11. A board has the right to dismiss a superintendent for failure to perform his duties or for misdeeds that militate against him as an administrator.

12. Even though a board has wide authority in the dismissal of a superintendent, it has no authority to dismiss him unless there is justifiable cause which can be proved in court.

[12] Bowden v. Board of Education, 264 Ill. App. 1 (1931); Robinson v. School Directors, 96 Ill. App. 604 (1901); School Directors v. Reddick, 77 Ill. 628 (1875); Neville v. School Directors of Dist. No. 1, 36 Ill. 71 (1864); Borger Independent School Dist. v. Dickson, 52 S. W. 2d 505 (Tex. Civ. App. 1932).

CHAPTER X

Powers of Boards of School Control in Regard to Teachers

ELECTION OF TEACHERS

Electing Teachers.—A board of school control has a wide discretion in the election of school teachers. Statutes authorizing a board to elect teachers to serve at the will of the board include every essential element in service thus established for a teacher, with the exception of those governed by specific statutes. Provided statutory regulations are abided by, the school board is allowed great freedom in exercising its honest judgment. The Supreme Court of New Mexico, April 19, 1942, ruled that in matters of employment of teachers the state board of education does not necessarily have control over local boards.

The Legislature having reposed the power in local school boards to employ teachers, and formulated a presumption of renewal of such employment under certain circumstances, we cannot say that Section 6 of Article 12 of the Constitution imposes any restrictions upon the exercise of this power. That the Legislature could clothe the state board of education with supervisory authority over the acts of the local school boards in the matter of the employment of teachers as it has with respect to their discharge from existing employment, we assume, but do not decide. All we say is that the Legislature has not done so.[1]

DURATION OF CONTRACT

Length of Term.—A board may employ a teacher for one or more years as it deems necessary, provided there is no law to the contrary. In the absence of statutory limit placed on the exercise of the power conferred upon a school board to contract with and employ teachers, a contract employing a teacher for a term to commence or to continue after the expiration of the term of one

[1] Bourne v. Board of Education of Roswell, 46 N. M. 310, 128 P. 2d 733, 736 (1942); Paquette v. City of Fall River, 278 Mass. 172, 179 N. E. 588 (1932); Broadhurst v. City of Fall River, 278 Mass. 167, 179 N. E. 586 (1932); Corrigan v. School Committee of New Bedford, 250 Mass. 334, 145 N. E. 530 (1924); Leonard v. School Committee of Springfield, 241 Mass. 325, 135 N. E. 459 (1922); Gerhardt v. Heid, 267 N. W. 127 (N. D. 1936); Mazzei v. School Dist. of Scranton, 341 Pa. 255, 19 A. 2d 155 (1941).

of the members of the board is valid and binding on its successors. This opinion is found in a case in the state of Washington wherein it is said that school districts are quasi corporations and that trustees are officers of them; that when the trustees are acting officially and within their jurisdiction, they bind the corporation they represent; and that their legal contracts can be enforced against their successors in office if in their judgment they think it best to employ a teacher for a longer term than their office. The decision by the Supreme Court of Washington, January 26, 1897, was:

> Can a board of directors of a school district make a valid contract with a teacher for a term of school to begin in the next succeeding year, and after the term of one of the directors has expired? . . . The district school board is a corporation representing the district. It is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its individual members. An essential characteristic of a valid contract is that it is mutually binding upon both the parties to it. A contract by a school board the duration of which extends beyond the term of service of one of its members is not, therefore, invalid for that reason.[2]

Though it is against the theory of sound judgment to state that the interest of the people of any school district should be considered above the interest of the state, there are a few jurisdictions which hold that a board has no power to contract with a teacher for a period of time extending beyond its term of office. Such jurisdictions hold that to contract with a teacher for more than one year at a time ties the hands of the succeeding board of school control and tends to take control of the school from the hands of the people from whom it draws its support. The Supreme Court of Iowa, November 26, 1917, in maintaining this position, said:

> Is it permissible under the law for an outgoing board to thus tie the hands of its successors, regardless of the bad taste involved? We do not think so. Only such powers are conferred on the board of directors as are expressly granted and necessarily implied in order to carry these out. . . .

[2] Taylor v. School Dist. No. 7, 16 Wash. 365, 47 Pac. 758, 759; Gardner v. North Little Rock Special School Dist., 161 Ark. 466, 257 S. W. 73 (1923); Gates v. School Dist., 53 Ark. 468, 14 S. W. 656 (1890); School Dist. No. 9 in Mesa County v. Gigax, 69 Colo. 162, 170 Pac. 184 (1918); Reubelt v. School Town of Noblesville, 106 Ind. 428, 7 N. E. 206 (1886); Farrell v. School Dist. No. 2, 98 Mich. 43, 56 N. W. 1053 (1893); Cleveland v. Amy, 88 Mich. 374, 50 N. W. 293 (1891); Tappan v. Carrollton School Dist. No. 1, 44 Mich. 500, 7 N. W. 73 (1880); Wait v. Ray, 67 N. Y. 36 (1876); Rivers v. School Dist. No. 51, Noble County, 68 Okla. 141, 156 Pac. 236 (1916), *aff'd*, 68 Okla. 141, 172 Pac. 778 (1918).

Though the statute . . . now permits a contract for a longer period in certain districts, it has no application to a rural independent school district. . . . Of course, . . . it is not essential that a contract be limited by the terms of individual members.[3]

The weight of information available from various decisions, however, indicates that most jurisdictions hold that a board may contract with teachers for a longer term than the duration of the board. Even in the above decision on the *Independent School District v. Pennington* case, the court admitted that it is not essential that a contract be limited by the terms of the individual members. Otherwise, we should have to abide by the theory that a school corporation is not a permanent organization of the state but a changing organization that must express the will of the people of the school district in preference to the interest of the state.

Contract with Leave of Absence.—In the absence of statutory authority, a board of school control does not have discretionary power, when a teacher's employment is from year to year, to renew the contract for another year with the stipulation that the teacher shall be given a leave of absence with pay during the term. In a case where the principal was elected annually and the school committee elected him for another year and at the same time voted him a year's leave of absence with half pay, the Supreme Court of Massachusetts in 1914 ruled that the board had no right so to use money raised by taxation:

It was in effect a pure gratuity so far as that year was concerned. This was beyond the power of any board of public officers, or indeed of the city itself by general vote. Municipalities have no power to appropriate money as gifts to any persons, no matter how strongly public sympathy may be moved in their favor.[4]

Termination of Contract.—A board of school control may not terminate without cause a teacher's contract before the end of the duration of the contract. The Florida Supreme Court stated:

. . . for the contract to be of any value, the teacher contracting must, of course, have the power to enforce the contract and recover damages for the breach thereof, and therefore, if damages accrue by reason of the breach of contract, such damage is incident to the expense of operation of the public schools.[5]

[3] Independent School Dist. v. Pennington, 181 Iowa 933, 165 N. W. 209, 210 (1917); Davis v. School Directors, 92 Ill. 293 (1879); Stevenson v. School Directors, 87 Ill. 255 (1877); Burkhead v. Independent Dist., 107 Iowa 29, 77 N. W. 491 (1898).

[4] Whittaker v. City of Salem, 216 Mass. 483, 104 N. E. 359, 360 (1914).

[5] Kelly v. Board of Public Instruction, 105 Fla. 398, 141 So. 311, 312 (1932); Little v. Carter County Board of Education, 125 Tenn. 497, 146 S. W. 2d 144 (1940).

If there is sufficient cause, however, the board may use its judgment in the dismissal of the teacher, and if he or she should resort to legal proceedings the court will uphold the action of the board if no abuse of action is found.

SELECTION OF TEACHERS

Personal Qualifications.—A board is invested with wide delegated powers to select teachers. An applicant may be qualified in every way for a position, so far as statutory provision is concerned, and yet not meet with the approval of the board of school control. In the event that he is not elected to the position for which he has applied, there is no legal basis to justify action by a court. The board has discretionary power to consider more than the necessary qualifications and experience. It may consider personal habits, peculiarities, state of health, temperament, skill and success in the government of pupils, or any other qualities known to the board. Under this rule a board may choose to select an applicant who has lower qualifications and less experience than other applicants, so long as the applicant meets the minimum requirements of statutory provision.[6]

Control by Taxpayers and Voters.—In the selection of teachers, voters and taxpayers have no right to enforce their will or choice upon the board of school control. On December 2, 1896, a decision of the Supreme Court of Nebraska was given as follows:

> The matter of hiring a teacher for the school, and who should be employed, was committed by law to the judgment and discretion of the district board; and the action of the board, or its proper members, in regard to hiring a teacher, with whom a contract should be completed, or the question of with whom the board had made a contract, cannot be controlled by mandamus, issued at the instance of a taxpayer of the district, or parties who have children to attend or in attendance upon the school.[7]

QUALIFICATIONS OF TEACHERS

Power to Prescribe Qualifications.—The board of school control has the power to prescribe for all teachers qualifications beyond the minimum requirements of any state. The law may specify basal requirements which all boards of school control within those bounds shall follow; but, in addition to those, the board may at its

[6] Douglass v. Commonwealth *ex rel.* Senior, 108 Pa. 559 (1885); Findley v. City of Pittsburgh, 82 Pa. 351 (1876); School Directors of Bedford Borough v. Anderson, 45 Pa. 388 (1863); Commonwealth *ex rel.* Sherry v. Jenks, 154 Pa. 368, 26 Atl. 371 (1893).

[7] State *ex rel.* Lewellen v. Smith, 49 Neb. 755, 69 N. W. 114, 115 (1896).

own discretion raise the standards for teachers whom it wishes to employ. The board has the further right of grading and classifying the teachers as it sees best. It becomes the right of the section boards, if there are any, to select from among those qualified by the standards of the board the teachers who are to fill the required positions in the different sections.[8]

Selection of Teachers by Sex.—A board of school control in using its delegated power to determine the fitness of the teacher for a position may consider whether a man or woman is better fitted for a position. Such action cannot be questioned by the court, by parents, residents, or other interested parties of a school district.[9] Although the court has no supervisory control over the exercise of the judgment of the board of school control in regard to its choice in selecting a man or woman for a position, however, it would not be legal for a board to make an appointment to a position only on the basis of the sex of the teacher if there is statutory or constitutional provision which prohibits distinctions of this character. Where there is a constitutional provision which states that men and women are alike eligible for a position of control or management under school law, the question of whether the appointment should go to a man or a woman must not be the sole determining factor.[10]

Selection of Sex of Teacher According to Type of Position.—The court holds that a board of school control may exercise wide discretion in selecting male or female teachers for positions which appear to be better adapted to one or the other. To place a man in a position where he would be required to supervise children of kindergarten age or to instruct girls in sewing or cooking would be, in the present state of the world's organization, incongruous. On the other hand, to place a woman in charge of football, mechanics, manual arts, or similar activities would usually be regarded as unwise. Therefore it would seem that the question of sex in relation to qualifications of teachers for different kinds of school positions is peculiarly within the delegated power of the board of school control. Opinions from courts in New York and Pennsylvania are that a board of education has the right to prescribe the qualifications of all teachers, to classify or grade them in accordance therewith in such manner and by such tests as the board in its discretion may deem best for the interest of the public-

[8] Youmans v. Board of Education, 7 C. D. 269, 13 Ohio Cir. Ct. 207 (1896).

[9] Commonwealth *ex rel.* Scott v. Board of Public Education, 187 Pa. 70, 40 Atl. 806 (1898); Commonwealth *ex rel.* Scott v. Gratz, 5 Pa. Dist. 341 (1896); Commonwealth *ex rel.* Sherry v. Jenks, 154 Pa. 368, 26 Atl. 371 (1893).

[10] Commonwealth *ex rel.* Sherry v. Jenks, 154 Pa. 368, 26 Atl. 371 (1893); Douglass v. Commonwealth *ex rel.* Senior, 108 Pa. 559 (1885); Findley v. City of Pittsburg, 82 Pa. 351 (1876).

school system of the district, and to take into consideration the question of the sex of the teachers in determining qualifications for different kinds of schools.[11]

TEACHERS' LICENSES

Discretionary Power in Regard to Teachers' Licenses.—The legislature may delegate authority to a board of school control to license teachers or to revoke their licenses. In either of these activities the board does not exercise judicial power in violation of constitutional provision. As a matter of fact, the board has a discretion so far analogous to judicial discretion as to be free from any claims of damages on account of a mistaken decision or error in judgment, if the discretion is not wilfully and corruptly abused to the injury of the teacher.[12]

CERTIFICATION OF TEACHERS

Employment of Teachers without Certificates.—In most states a teacher must have a certificate in order that a contract be valid. For instance, a North Dakota statute states that any person not holding a lawful certificate cannot be employed to teach; on April 1, 1890, the Supreme Court of North Dakota stated that a teacher who does not have a certificate as required by law cannot collect for his work, and that a warrant or warrants issued, even if by the school officials, are invalid.

> There is no force in the position that the defendant, having received the benefit of the teacher's services, is liable. Such a doctrine would defeat the policy of the law, which is to give the people of the state the benefit of trained and competent teachers. The law recognizes only one evidence that that policy has been regarded—the certificates of qualification. If the defendant could be made liable by the mere receipt of the benefit of the services rendered, the law prohibiting the employment of teachers without certificates, and declaring void all contracts made in contravention of that provision, would be, in effect, repealed, and the protection of the people against incompetent and unfit teachers, which such statute was enacted to accomplish, would be destroyed.[13]

In some states a teacher must have a lawful certificate at the time the contract is made in order that a contract be valid. The principle is well illustrated as follows: A contract was made on

[11] Fitzpatrick v. Board of Education, 69 Misc. 78, 125 N. Y. S. 954 (1910); Houseman v. Commonwealth, 100 Pa. 222 (1882).

[12] Stone v. Fritts, 169 Ind. 361, 82 N. E. 792 (1907); Elmore v. Overton, 104 Ind. 548, 4 N. E. 197 (1886); Marrs v. Matthews, 270 S. W. 586 (Tex. Civ. App. 1925).

[13] Goose River Bank v. Willow Lake School Township, 1 N. D. 26, 44 N. W. 1002 (1890).

August 3, 1896; the school was to open on September 7, 1896. Although the applicant had no certificate the day the contract was made, he received one before the school was opened. It was held by the Supreme Court of New York, Appellate Division, that his contract was invalid because an unqualified person could not enter into a contract to teach according to state law.[14]

Some interpretations have been given, however, which state that a board of school control may elect a qualified teacher who does not have a certificate but who is entitled to one. The person so elected to a teaching position must obtain a satisfactory certificate before entering upon his duties.[15]

As has been seen, some statutes are interpreted to mean that no teacher without a certificate at the time of drawing the contract is to be employed, whereas others are interpreted to specify that a teacher may be employed without a certificate provided he is qualified for and receives a certificate before beginning work. Usually in either case, however, a teacher without a lawful contract cannot recover compensation for services rendered. The somewhat similar but specialized case of *Libby v. Inhabitants of Douglas,* however, is not to be confused with this issue: according to Massachusetts law a teacher, before opening school, was to obtain from the committee a certificate in duplicate, one copy of which was to be deposited with the selectmen, before any payment was to be made to the teacher. The court ruled that since the committee voted to grant the certificate and allowed the teacher to open school without it, the facts that he obtained only one copy and that he deposited this with the selectmen two days after the opening of school did not prevent his being compensated for his services.[16]

Expired Certificates.—If a teacher's certificate expires while he is teaching and he does not secure a new one for the remainder of the term, he does not remain eligible to teach, and the board

[14] O'Connor v. Francis, 42 App. Div. 375, 59 N. Y. S. 28 (1899); School Directors v. Newman, 47 Ill. App. 364 (1892); Putnam v. School Town of Irvington, 69 Ind. 80 (1879); McCloskey v. School Dist. No. 5, 134 Mich. 235, 96 N. W. 18 (1903); O'Leary v. School Dist. No. 4, 118 Mich. 469, 76 N. W. 1038 (1898); Jenness v. School Dist. No. 31, 12 Minn. 448 (1867); Hosmer v. Sheldon School Dist. No. 2, 4 N. D. 197, 59 N. W. 1035 (1894).

[15] Lee v. Mitchell, 108 Ark. 1, 156 S. W. 450 (1913); Hotz v. School Dist. No. 9, 1 Colo. App. 40, 27 Pac. 15 (1891); Board of Education for Logan County v. Akers, 243 Ky. 177, 47 S. W. 2d 1046 (1932); Lovelace v. Steinbeck, 225 Ky. 669, 9 S. W. 2d 1002 (1928); Schafer v. Johns, 23 N. D. 593, 137 N. W. 481 (1912); Youmans v. Board of Education, 7 C. D. 269, 13 Ohio Cir. Ct. 207 (1896); School Dist. No. 2, Oxford Township v. Dilman, 22 Ohio St. 194 (1871).

[16] Libby v. Inhabitants of Douglas, 175 Mass. 128, 55 N. E. 808 (1900).

has no discretionary authority to pay him a salary for the time he teaches after the expiration of his certificate.[17]

Certificate Dated Back.—When a teacher is entitled to a certificate but has not received one for some time after his work has begun, but through no fault of his own, the certificate may be dated back to the time of the qualification of the teacher, that is, to the date when the certificate was due to be issued to him.[18]

FIXING SALARIES

Setting Teachers' Salaries.—A school board has power to determine the salary schedule for its particular division, so long as it stays within statutory limitations and so long as the salary schedule is adopted before the beginning of school. Cognizance may be taken of the factors within the scope of the service of the teacher to assist in deciding considerations that may be given for special duties, special accomplishments, or exceptional service.[19] Some courts hold that a board may either reduce or raise the state salary schedule at its discretion, provided that the raise is general and does not conflict with statutory provisions.[20] Permanent teachers may be demoted in rank and salary and their positions changed if there is no statute forbidding such action and if it is clear that there is no abuse of discretion on the part of the board.[21]

Restriction on Salaries Imposed by Municipal Corporations.—In some states the municipal division of the state in which the school is located appropriates the money used for local school purposes. The school officials estimate the amount of money needed to defray the expenses of the school, and the municipal board either rejects or accepts the figures determined by the board of school control. Then the question arises as to whether the school board has any discretion as to the amount of funds it will request for the various school expenditures, and, if so, whether it can enforce its request.

[17] Youmans v. Board of Education, 7 C. D. 269, 13 Ohio Cir. Ct. 207 (1896).

[18] Bradfield v. Avery, 16 Idaho 769, 102 Pac. 687 (1909).

[19] Morris v. Williams, 59 F. Supp. 508 (E. D. Ark. 1944); Rible v. Hughes, 150 P. 2d 455 (Cal. 1944); Kacsur v. Board of Trustees, 109 P. 2d 731 (Cal. App. 1941); Board of School Trustees, School City of Peru v. Moore, 33 N. E. 2d 114 (Ind. 1941); Paquette v. City of Fall River, 278 Mass. 172, 179 N. E. 588 (1932); Leonard v. School Committee of Springfield, 241 Mass. 325, 135 N. E. 459 (1922); Liva v. Board of Education of Lyndhurst Township, 26 N. J. L. 221, 18 A. 2d 704 (1941); Gilliam v. Adams, 171 S. W. 2d 813 (Tenn. 1943).

[20] Aebli v. Board of Education, 145 P. 2d 601 (Cal. 1944); Paquette v. City of Fall River, 278 Mass. 172, 179 N. E. 588 (1932).

[21] Kacsur v. Board of Trustees, 109 P. 2d 731 (Cal. App. 1941); Liva v. Board of Education of Lyndhurst Township, 26 N. J. L. 221, 18 A. 2d 704 (1941).

In the absence of statutory provision, the weight of evidence signifies that the board of school control does not have to submit to the action of the municipal board, but that a broad discretion is allowed provided that the figures set are within statutory limitations for the tax rate in that particular school district. The reason for this opinion is given by a Massachusetts court:

> The power given to the school committee to contract with teachers necessarily implies and includes the power to determine their salaries. And in so doing they are not restricted to the amount appropriated for the purpose by the city council. . . . If the city council could establish the salary, it could thereby greatly narrow the range of choice, or even indirectly prevent the possibility of obtaining any suitable instructors.[22]

Wages Based upon the Sex of the Teacher.—The Supreme Court in New York held that a school board has no discretionary authority to make a wage scale that discriminates between male and female teachers. Salaries may be paid according to the kind of work performed, but only in this way may discrimination be made.[23] This ruling is limited, however, to wage scales in states where there are statutory regulations regarding it; in New York and New Jersey there are statutes which state that in the formulation of a scale of wages for the employment of teachers, there shall be no discrimination based upon the sex of the teacher.

PAYMENT OF SALARIES IN CASE OF FIRE OR ILLNESS

Closing of Schools Because of Epidemics.—Although in one case the closing of a school was not thought to be left to the discretion of a school board because health officials issued an order to close the school during an influenza epidemic, in general if a school is closed by the school or health authorities, teachers may collect full compensation.[24] In the case of *Gregg School Township v. Hinshaw* the Appellate Court of Indiana in 1921 ruled

[22] City of Charleston v. Gardner, 98 Mass. 587, 589-590 (1868); State *ex rel.* Johnson v. Wilcox, 11 Ohio St. 326 (1860).

[23] Regan v. State Board of Education, 109 N. J. L. 1, 159 Atl. 691 (1932); Moses v. Board of Education of Syracuse, 245 N. Y. 106, 156 N. E. 631 (1927).

[24] Phelps v. School Dist. No. 109, 302 Ill. 193, 134 N. E. 312 (1922); Gear v. Gray, 10 Ind. App. 428, 37 N. E. 1059 (1894); Smith v. School Dist. No. 64 of Marion County, 89 Kan. 225, 131 Pac. 557 (1913); Libby v. Inhabitants of Douglas, 175 Mass. 128, 55 N. E. 808 (1900); Dewey v. Union School Dist. of Alpena, 43 Mich. 480, 5 N. W. 646 (1880); Board of Education of Hago v. Couch, 63 Okla. 65, 162 Pac. 485 (1917); Gilroy v. School-Dist. No. 5, 17 Ore. 522, 21 Pac. 665 (1889); Goodyear v. School Dist. No. 5, 17 Ore. 517, 21 Pac. 665 (1889); Appeal of School Dist. of City of Bethlehem, 347 Pa. 418, 32 A. 2d 565 (1943); McKay v. Barnett, 21 Utah 239, 60 Pac. 1100 (1900).

that a teacher may not collect his salary under such circumstances because the health officials, acting according to statutory power delegated them, prevented the performance of the contract.

It was in the exercise of this police power, which had been delegated to it by statute, that the health officers closed the school here involved, and such act was independent of the authority of the township trustee, and entirely beyond his control. . . . It is the rule that, when the performance of a contract becomes impossible, nonperformance is excused, and no damages can be recovered. After the contract was entered into, and when the exigency arose, the health board, in the exercise of the police power delegated to it, closed the school, and the contract for the time that the order was in force was impossible of performance, and hence unenforceable, and there could be no recovery for such time.[25]

This ruling may be considered erroneous so far as establishing a precedent is concerned, because it violates a fair principle in equity and a well-established concept in common law: that a qualified employee who fully performs or stands ready and willing to perform the terms of his contract during its continuance should not be denied compensation in full, regardless of changed or unexpected conditions over which he has no control. The philosophy underlying the following example seems to be sound and generally followed: a school was closed from December 10 until March 17 on account of smallpox, and the board deducted from salaries of teachers for the time school was not in operation. In a suit to compel the board to pay the salary for the days the school was closed a teacher was upheld by the court. The opinion of the court in 1880 was:

Beyond controversy, the closing of the schools was a wise and timely expedient; but the defense interposed cannot rest on that. It must appear that the observance of the contract by the district was caused to be impossible by an Act of God. . . .

. . . But the district did not stipulate for the right to discontinue the plaintiff's pay on the judgment of its officers, however discreet and fair, that a stoppage of the schools is found a needful measure to prevent their invasion by disease, or to stay or oppose its spread or progress in the community, and the court cannot be regarded as tacitly subject to such a condition.[26]

A case as late as 1922 in Illinois holds that even though a school is closed by a board of health, the teacher may collect for the time the school is not in session, and that no discretionary

[25] Gregg School Township v. Hinshaw, 76 Ind. App. 503, 132 N. E. 586, 587 (1921).

[26] Dewey v. Union School Dist. of Alpena, 43 Mich. 480, 5 N. W. 646, 647-648 (1880).

power is vested in the school board to withhold compensation for the duration of the contract. The opinion of the Supreme Court of Illinois is as follows:

Both parties are presumed to have known when the contract was made that the state board of health had authority to order the school to be closed, if an epidemic occurred which rendered such action necessary for the protection of the lives and health of the people of the community. Neither one of them could know whether such a contingency would arise during the period covered by the contract. If appellant had desired to be relieved of liability in the event such a contingency arose and caused the school to be closed, it could have accomplished that result by so stipulating in the contract. No such qualification was placed in the contract. . . . It was no fault of appellee that the school was closed a portion of the time she was employed to teach, neither was it the fault of appellant. Someone was required to suffer loss resulting from an unforeseen contingency which caused the school to be closed, and the rule is that the loss will rest on the party who has contracted to bear it, for if he did not intend to bear it he should have stipulated against it. If the performance of the contract had been legally impossible, it would have been unenforceable, but its performance was not legally impossible. When made, the contract was lawful and valid.[27]

Teacher's Salary in Event of Fire.—Even though a school district may lose its building as a result of fire, a teacher can collect his salary for the duration of the contract. As in the closing of a school because of an epidemic, the destruction of a school building by fire is a situation over which the teacher has no control, and the loss should not fall upon the teacher but upon the district.[28]

ISSUING ORDERS FOR TEACHERS' SALARIES

Boards of school control cannot refuse to issue orders for teachers' salaries, even though the treasurer has no funds with which to pay them, when by statute such orders are made the medium for paying teachers. If the legislature has made it the duty of school boards to pay teachers monthly, to fail to do this is diametrically opposed to legislative enactment. Therefore the board has no discretionary right to withhold an order for paying teachers under any circumstances.[29]

CONTRACT IN WRITTEN FORM

Generally where statutory provision requires that a contract must be in written form, a teacher who does not have a written

[27] Phelps v. School Dist. No. 109, 302 Ill. 193, 134 N. E. 312, 313 (1922).

[28] Hughes v. Grant Parish School Board, 145 So. 794 (La. App. 1933); Clune v. School Dist. No. 3, 166 Wis. 452, 166 N. W. 11 (1918).

[29] People *ex rel.* Mereness v. Board of Education, 349 Ill. 291, 182 N. E. 383 (1932); People *ex rel.* Booth v. Opel, 244 Ill. 317, 91 N. E. 458 (1910).

contract cannot be regarded as legally employed. Any other kind of contract is an ineffective means to force a board to pay a salary, and the board may at its own discretion pay for the time the teacher may have taught. In many jurisdictions the teacher cannot sue for breach of contract if the contract is not in writing; in some states he may not even collect on work already performed. A Georgia court decision of 1933, based on statute, was:

> No contract made by a county board of education for the employment of a teacher to serve the schools under the jurisdiction of the board is legal or possesses any validity, where it is not in writing.[30]

CHANGING DISTRICTS

Contract of a Teacher Who Changes Districts.—An Oklahoma court ruled that a teacher who had a contract entered into before July 1, the beginning of the fiscal year, could not hold accountable for salary an independent district board for the following fiscal year if in the interim the district which had employed her were annexed to the independent district. On the other hand if the contract had been entered into after July 1, which would have been in the fiscal year, the teacher might have held the position or collected such salary as was contracted for.[31]

APPOINTMENT OF TEACHERS

Signature of Teacher Unnecessary for Appointment.—Where a board has completed the appointment of a teacher, unless there is a statutory provision to the contrary, the appointment cannot be revoked without cause, even though the board may change its personnel and even though the contract may not have been signed by the teacher or formally accepted by her. For example, on April 10, 1931, at a meeting of the board of school control in Charleston, West Virginia, an order was entered for the appointment of a teacher for the school year 1931-1932. On April 11, 1913, the president of the board signed the form of contract required by the state superintendent of schools, on which the appointment of the teacher was evidenced. A few days later the teacher wished also to sign the contract, but was refused that right. When the board, changed in personnel, revoked the appointment, the Supreme Court of Appeals of West Virginia ruled:

[30] Dodd v. Board of Education of Forsythe County, 46 Ga. App. 235, 167 S. E. 319, 320 (1933); Orr v. Riley, 160 Ga. 480, 128 S. E. 669 (1925); Taggart v. School Dist. No. 1 of Multnomah County, 96 Ore. 422, 188 Pac. 908 (1920).

[31] Board of Education of Terral v. Challey, 153 Okla. 273, 5 P. 2d 747 (1931).

In Code 1931, 18-7-1 prescribing the procedure for the appointment of a school teacher, the sole requirements are, that (1) the board of education shall make the appointment . . . and (2) the appointment shall be in writing, according to the form of contract to be furnished by the state superintendent of schools. . . . Under settled law, the appointment was complete without the plaintiff's acceptance, and could not thereafter be revoked without good cause shown.[32]

TENURE OF TEACHERS

Permanent-Tenure Teachers versus Nontenure Teachers.—A board may not cancel an indefinite contract with a teacher on the grounds of justifiable decrease in the number of teaching positions where nontenure teachers are still retainable.[33] It has been held that a teacher under tenure may be replaced because of neglect of duty, immorality, incompetency, or insubordination. A teacher may be temporarily dismissed if it is necessary to reduce the number of teaching positions, but his name must be placed on the retained list and he must be reappointed when a position for which he is prepared opens. A teacher who has an indefinite or permanent contract may not be replaced by one who is not under tenure at all. In this connection the Supreme Court of New Jersey in 1933 held:

Granting that apart from the statute, a school board may in the interest of economy reduce the number of teachers, the protection afforded by the statute would be little more than a gesture if such board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom, and retaining the nonexempt. If such reduction is to be made at all, and a place remains which the exempt teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by statute.[34]

Tenure when Law Is Repealed.—If a teacher is employed under tenure law and serves her probationary period, she becomes a "permanent teacher," notwithstanding the repeal of the law. Where there is no statutory regulation a board of school control

[32] Taylor v. Board of Education, 111 W. Va. 52, 160 S. E. 299 (1931); Marbury v. Madison, 1 Cranch 137 (U. S. 1803); Speed v. Common Council of Detroit, 97 Mich. 198, 56 N. W. 570 (1893); Witherspoon v. State *ex rel.* West, 138 Miss. 310, 103 So. 134 (1925).

[33] Barnes v. Mendenhall, 98 Ind. App. 229, 183 N. E. 556 (1932); Dailey v. Mendenhall, 98 Ind. App. 699, 183 N. E. 561 (1932); Kennington v. Red River Parish School Board, 200 So. 514 (La. App. 1940); Andrews v. Union Parish School Board, 184 So. 574 (La. App. 1938), *aff'd*, 191 La. 90, 184 So. 552 (1938); Malone v. Hayden, 329 Pa. 213, 197 Atl. 344 (1938).

[34] Seidel v. Board of Education of Ventnor City, 110 N. J. L. 31, 164 Atl. 901, 902 (1933).

may, however, impose terms which differ from previous terms if there is no abuse of discretion.[35]

Serving Notice of Dismissal.—Where there is a statute which states that on or before a specified date a board of school control must notify a teacher that his services are no longer desired, a teacher may claim employment for the ensuing year if the board itself does not notify him, although he is not on permanent tenure. The board of school control does not have discretionary power to waive its responsibility by authorizing the county superintendent to notify the teacher.[36]

Life Certificate.—A teacher holding a life certificate is entitled to teach without further examination. A county board of school control which has the authority to pass upon teachers recommended by the local board cannot reject, on the grounds of its own resolutions, the recommendations made at the discretion of the local board of a teacher who holds a life certificate. A life certificate permitted by statute holds, even though according to scholastic attainments it is not so high as standards set by the county board. On January 17, 1933, the Kentucky Court of Appeals said:

> It is beyond the realm of sound reasoning to say that the Legislature intended that a certificate extended for life by the state board of education might in effect be abrogated and annulled by any resolution of a county board of education, or that the holder of such certificate should be required to requalify to meet increased standards fixed by such board.[37]

This rule will hold universally unless there is statutory provision that grants a county board powers to the contrary.

RULES AND REGULATIONS FOR TEACHERS

Reasonable Rules.—When a person accepts a position to teach school, he expects to perform his duties under such rules and regulations as the board in its discretion sees fit to establish. Courts in different states, however, have held that a board may make only such rules as are lawful and reasonable for the welfare of the school. The board may not make rules and regulations contrary to statutory provision or to gratify a whim.

[35] Indiana *ex rel.* Anderson v. Brand, 303 U. S. 95 (1938); Lost Creek School Township v. York, 21 N. E. 2d 58 (Ind. 1939).

[36] Brown v. Board of Education of Blount County, 5 So. 2d 629 (Ala. 1942); Board of Education of Marshall County v. Baugh, 240 Ala. 391, 199 So. 822 (1941).

[37] Simpson County Board of Education v. Bradley, 246 Ky. 822, 56 S. W. 2d 528, 529 (1933); McDonald v. Nielsen, 43 N. D. 346, 175 N. W. 361 (1919).

Residence.—A board may make and enforce a rule that every teacher who teaches in a particular school district must reside within that school district during the school term if it feels that a teacher cannot give his best service when he is so far distant from a school that he is not available for more than the school day and that he must depend on transportation in going to and from the school. In commenting upon this in 1911, the Supreme Court in California said:

> . . . in contemplation of the fact that the teacher stands in loco parentis, that it may become her duty to devote her time to the welfare of individual pupils, even outside of school hours, that the hurrying for boats or trains cannot be regarded as conducive to the highest efficiency on the part of the teacher, that tardiness may result from delays or obstructions in the transportation which a nonresident teacher must use, and, finally, as has been said, that the "benefit of pupils and resulting benefit to their parents, and to the community at large, and not the benefit of teachers, is the reason for the creation and support of the public schools," . . . all these . . . certainly make the resolution in question a reasonable exercise of the power of the board of education.[38]

Assignment of Duties.—A board of school control may exercise its discretionary privilege in assigning a teacher, if he is prepared, to work other than that for which he is employed. For instance, a physical education director may be assigned to a coaching position if he has training for it.[39] The board may not, however, arbitrarily assume the right to assign a teacher to teach a subject for which he is not licensed. Such an act constitutes a breach of authority.[40]

Determining Boarding Place.—Although a board may use its discretion as to whether to require a teacher to reside within a given school district, it may not determine the boarding place of a teacher, since such a restriction is considered an interference with personal rights. The Supreme Court of New Hampshire in 1910 held:

> The rule of the board as to the teacher's boarding place related to a matter as to which they were given no authority by existing law. . . . Their refusal, therefore, to permit the plaintiff to continue the school with a different boarding place was unwarranted, and the plaintiff's determination to change her boarding place did not authorize them to terminate her employment as teacher.[41]

[38] Stuart v. Board of Education, 161 Cal. 210, 118 Pac. 712, 713 (1911).

[39] Jacobson v. Board of Education of New York, 177 Misc. 809, 31 N. Y. S. 2d 725 (1941).

[40] Appeal of Ganaposki, 332 Pa. 550, 2 A. 2d 742 (1938).

[41] Horne v. School Dist. of Chester, 75 N. H. 411, 75 Atl. 431 (1910).

HEALTH RULES FOR TEACHERS

Physical Examination.—Courts have held that for the protection of the health of school children the board may, if there is no statute to the contrary, require physical examinations and health regulations for teachers as well as for pupils. A court in the District of Columbia held that such a rule was within the discretion of the board for the welfare of the school and community, since it was reasonable and valid to require a teacher to be physically fit to perform duties efficiently and to remain free of diseases which might be a menace to the school and community.[42]

Vaccination.—Where it is legal to require vaccination of children, there is no reason why the board of school control should not demand that all teachers be vaccinated also. In this connection the Supreme Court of Pennsylvania has said:

> At the time the motion was heard the plaintiff had been suspended by direction of the chairman of the committee on high school for girls, because she refused to comply with the provisions of a resolution of the committee on hygiene relative to vaccination of teachers, which action of the committee was subsequently approved by the board of public education. . . . We cannot assent to the proposition that the board had not power to suspend her because of her refusal to comply with the regulation.[43]

RELIGIOUS GARB AND INSTRUCTION OF TEACHERS

Religious Garb.—According to a decision handed down in a New York court concerning religious garb, the wearing of any distinctive ecclesiastical dress is a violation of a constitutional provision which forbids the use of public money in support of a school in which a sectarian doctrine is taught. Therefore if a board makes a rule against the wearing of religious garb in a public school, a teacher who does so is not entitled to compensation for services rendered, though the contract to teach may have been drawn before the establishment of the regulation.

> We are thus brought to the question whether in this state a regulation is to be deemed unreasonable which prohibits teachers in the common schools from wearing a distinctively religious garb while engaged in the work of teaching. In my opinion it cannot justly be so regarded. "Neither the state," says the Constitution, "nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. . . ." Here we have the

[42] Coleman v. District of Columbia, 279 Fed. 990 (App. D. C. 1922).
[43] Lyndall v. High School Committee, 19 Pa. Super. 232, 234 (1902).

plainest declaration of the public policy of the state in the public schools.[44]

Also the opinion was given that a board of school control, whether it be state, county, or local, may declare a resolution against the wearing of religious apparel. The court stated that even though "there is no express grant of authority to the state superintendent of public instruction . . . in the consolidated school law to establish regulations as to the management of the common schools, the existence of a general power of supervision on his part over such schools is clearly implied in many parts of the statute"; that "if the superintendent possessed the power to establish regulations in regard to the management of the common schools, the courts will not pronounce such regulations invalid unless they are unlawful or unreasonable; and that "it must be conceded that some control over the habiliments of teachers is essential to the proper conduct of schools."[45] The court pointed out that a different view was taken in 1894 in the case of *Hysong v. School District,*

where it was held that school districts might employ as teachers sisters of a religious order of the Roman Catholic Church, and permit them while teaching to wear the garb of their order, provided no religious sectarian instruction should be given, nor any religious exercises engaged in. There was a dissenting opinion in that case, however, strongly reasoned in support of the conclusion that a school conducted similarly to that in the case at bar was in effect dominated by sectarian influence.[46]

Opposite View on Religious Garb.—In the *Hysong v. School District* case the court ruled that where there is no statutory provision or order from the state superintendent of public education prohibiting the practice of wearing religious garb, a board may use its discretion as to whether it will permit the wearing of religious costume by a teacher while he is engaged in the actual classroom work of a public school. In this case the board, which employed Catholic nuns to teach in public schools, was questioned because of this practice; the Supreme Court of Pennsylvania in 1894 said:

It may be conceded that the dress and crucifix impart at once knowledge to the pupils of the religious belief and society membership of the wearer. But is this, in any reasonable sense of the word, "sectarian" teaching, which the law prohibits? . . . The religious belief of teachers and all others is generally well known to the neighborhood

[44] O'Connor v. Hendrick, 184 N. Y. 421, 77 N. E. 612, 614 (1906); Commonwealth v. Herr, 229 Pa. 132, 78 Atl. 68 (1910).

[45] *Ibid.*

[46] Hysong v. School Dist. of Gallitzen Borough, 164 Pa. St. 629, 30 Atl. 482, 484 (1894).

and to pupils, even if not made noticeable in the dress, for that belief is not secret, but is publicly professed. Are the courts to decide that the cut of a man's coat or the color of a woman's gown is sectarian teaching, because they indicate sectarian religious beliefs?[47]

Prohibiting Religious Instruction.—In the absence of any statutory or constitutional provision requiring any specific subject to be taught, the board may use its discretion in declaring what shall be and what shall not be taught in the school. A board is within its rights to make a rule against the reading of the Bible or in any other way imparting religious instruction to pupils. In an Ohio case in 1900 a teacher refused to comply with a rule of the school board prohibiting the reading of the Bible and prayer. The board appealed to the court to restrain her act of insubordination, but the court refused to interfere, stating that such a breach of contract must be handled by the board:

Both Bible reading and prayer are all right and proper, if required or allowed by the custom and rules of the particular school, which a teacher is employed to conduct. But if such practices are not permitted by those who have the lawful right to decide the matter, then upon every principle of moral duty and contract obligation, it is incumbent upon those who teach in such schools to observe the lawful rules by which they have agreed to be guided in the performance of their duties. Such laws invade no civil or religious right of the teacher.[48]

RELIGIOUS FAITH OF TEACHERS

Any teacher who has good moral character and presents a certificate qualifying him to teach is not subject to any further judicial inquiry into his fitness to teach. Furthermore no one has the right to insist upon judicial interference when the teacher has qualified according to the statutory requirements. Religious faith is not a just basis for the rejection of a teacher. If a board should elect to use its discretion to do so, it might conceivably be within its rights to make a rule that it would employ all teachers of one religious faith or of no religious faith, but such a decision would obviously be unreasonable. In the United States all people have the right to worship according to their desires or not to worship at all. In 1894 the Supreme Court of Pennsylvania ruled:

Our constitution negatives any assertion of incapacity or ineligibility to office because of religious belief. . . . If, by law, any man or woman can be excluded from public office or employment because he or she is a Catholic, that is a palpable violation of the spirit of the

[47] *Ibid.*

[48] Board of Education of New Antioch Special School Dist. v. Paul, 7 Ohio N. P. 58, 60 (1900).

constitution; for there can be, in a democracy, no higher penalty imposed upon one holding to a particular religious belief than perpetual exclusion from public station because of it.[49]

PATRIOTIC AND POLITICAL DUTIES

Patriotic Activities.—A board has a broad discretion in requiring teachers to comply with reasonable rules concerning nonpartisan patriotic activities in the schools. The children should be taught to love their country and their flag while they are in the public schools, and teachers are those who should be best qualified to teach them. The courts uphold the rules of board members concerning patriotism because citizenship and the welfare of the children and community at large are at stake.[50]

A New York court in October, 1918, ruled that the school board may use its discretion in demanding that a teacher use his influence and knowledge in co-operation with Red Cross work, in urging pupils to purchase thrift stamps, and in teaching them to assist their country in time of war, even though his religious beliefs should be opposed to war. His is a public duty, and he is expected to concur in the acts of such duty, so long as the acts are wise and just.[51]

Political Activities.—A California decision stated that a board may use its authority in prohibiting the active advocacy of any candidate or political issue in school by a teacher, because such action introduces into the school dissensions and questions foreign to the school's welfare. A District Court of Appeals of California, on March 12, 1924, said:

> . . . the advocacy before the scholars of a public school by a teacher of the election of a particular candidate for a public office—the attempt thus to influence support of such candidate by the pupils and through them by their parents—introduces into the school questions wholly foreign to its purposes and objects. . . .[52]

Membership in the teaching profession does not, however, debar a teacher from voting or engaging actively in political campaigns, provided that his activities do not extend to the schoolroom, and a board has no discretionary right to forbid such action on the part of the teacher.[53]

[49] Hysong v. School Dist. of Gallitzen Borough, 164 Pa. St. 629, 30 Atl. 482, 483 (1894); O'Connor v. Hendrick, 184 N. Y. 421, 77 N. E. 612 (1906).

[50] Foreman v. School Dist. No. 25, 81 Ore. 587, 159 Pac. 1155 (1916).

[51] McDowell v. Board of Education, 104 Misc. 564, 172 N. Y. S. 590 (1918).

[52] Goldsmith v. Board of Education, 66 Cal. App. 157, 225 Pac. 783, 789 (1924).

[53] Gardner v. North Little Rock Special School Dist., 161 Ark. 466, 257 S. W. 73 (1923).

RULES CONCERNING MARRIAGE OF WOMEN TEACHERS

Rule against Retaining Women Teachers Who Marry.—It is the duty of a school board to promote public interest in the school and community. Accordingly, if the board believes that it is best to have and to enforce a rule that no married woman teacher should be employed, or that a single teacher should be automatically dropped if she should marry, some courts have held the rule to be within the discretion of the board. The Supreme Court of Minnesota in 1932 issued the following statement:

> So long as a board employs qualified teachers, it is the sole judge as to whom it will employ. . . .
>
> . . . Granting that there may be a wide difference of opinion as to the wisdom of the policy involved, the fact remains that the board has the duty and authority to establish a suitable policy, and it is apparent that, in the instant case, it exercised its discretion in good faith.[54]

Many courts, however, consider such a ruling to be against public policy on the ground that to forbid or to prevent marriage is against the interest of the public at large, unsound, and against the ruling of the United States Supreme Court, which holds that marriage is a domestic relation highly favored by law. When passing judgment on the validity of a contract in restraint of marriage, the Supreme Court of Oregon said:

> If a teacher becomes inefficient or fails to perform a duty, or does some act which of itself impairs usefulness, then a good or reasonable cause for dismissal would exist. The act of marriage, however, does not of itself furnish a reasonable cause. . . . The clerk of the board admitted that in some instances a woman becomes a better teacher after marriage than she was before. The reason advanced for the rule adopted by the board is that after marriage a woman may devote her time and attention to her home rather than to her school work.[55]

RETIREMENT FUND OF TEACHERS

Deduction of Salary for Retirement Fund.—A board of school control may not at its discretion cause an amount to be deducted from a teacher's salary to accrue to his retirement fund, unless there is statutory provision granting this permission. Any regulation of this kind in the absence of specific authority is void because it violates constitutional rights that private property may

[54] Backie v. Cromwell Consolidated School Dist. No. 13, 186 Minn. 38, 242 N. W. 389, 390-391 (1932); McQuaid v. State *ex rel.* Sigler, 6 N. E. 2d 547 (Ind. 1937).

[55] Richards v. District School Board, 78 Ore. 621, 153 Pac. 482, 485 (1915); Jameson v. Board of Education, 74 W. Va. 389, 81 S. E. 1126 (1914).

not be confiscated without due process of law. Nor may a board make a proviso in the contract that the employment of a teacher automatically makes his salary subject to a deduction. In 1902 the Supreme Court of Minnesota stated:

The conviction cannot be avoided that the effect of such a requirement, when applied to all teachers employed, must be to compel some of them, at least, to enter into the contract upon compulsion and without any expectation of receiving any personal benefit therefrom. It is difficult, therefore, to sustain the validity of the act on the part of the board of education in thus withholding the 1 per cent. of the salaries upon the ground that such a plan was voluntarily entered into by the teachers in signing the contract.[56]

UNION AFFILIATION OF TEACHERS

In 1914 when a board in Cleveland adopted a resolution providing that no person should be employed who was affiliated with a labor union, the action was declared by an Ohio circuit court decision to be entirely within the board's rights. This decision arose from the act of some teachers in the Cleveland schools who in 1914 decided to affiliate with the American Federation of Labor for the purpose of bringing about higher wages. The board of school control in Cleveland thought that such an affiliation would be detrimental to the public-school situation and passed a resolution against all teachers' joining the union. The board decided that it would consider any teacher who should join the association as having severed connection with the Cleveland schools. The court stated that since a school board has power to say what is and what is not detrimental to a school, so long as it does not act in an arbitrary, wanton, or otherwise injudicious manner, or violate statutory provision; since a board has the right to appoint any teacher who is qualified, or even, if it elects to do so, to appoint a qualified teacher with a lower certification than others who may apply; and since it also has the same discretionary privilege of rejecting any application of which it does not approve, then the court cannot interfere if the board chooses to elect those teachers who are nonmembers of unions.[57]

On the other hand the Appellate Court of Illinois ruled in 1916:

By these decisions it is settled that any rule which the board might pass restricting the employment of teachers to members of any particular societies or unions would be void. It follows logically that

[56] State *ex rel.* Jennison v. Rogers, 87 Minn. 130, 91 N. W. 430, 432 (1902); Venable v. Schafer, 28 Ohio Cir. Ct. 202 (1906); State *ex rel.* Ward v. Hubbard, 22 Ohio Cir. Ct. 252 (1901).

[57] Frederick v. Owens, 35 Ohio Cir. Ct. 538 (1915).

a rule which restricts employment to nonmembers of such societies or unions is also void.

. . . The law is that the board may stipulate for the amount of training, the degree of proficiency and the physical fitness of its teaching employees, but it cannot provide that its teaching shall be done only by certain persons or classes of persons members or nonmembers of certain societies.[58]

Rule on Labor Affiliation for Teachers in Service.—The Illinois Supreme Court has likewise stated that a board of school control may make freedom from union affiliation a condition of employment, but if such a rule is passed after the election of a teacher for the ensuing year, the rule is not binding for that year.[59] It is not within the scope of this study to consider to what extent public opinion has changed since this Illinois decision was handed down, but it will be noticed that opinion against it is growing stronger.

DISMISSAL OF TEACHERS

Power to Discharge Teachers.—Many court decisions declare that where a board of school control is invested by statute with power to discharge teachers for incompetency or for any other cause, the will of the majority of the members of the board is sufficient. A teacher in a public school is a public employee of the board, and the relation of the board to him is that of employer to employee. The teacher is not a public officer elected by the people and cannot legally declare himself to be so. He is therefore subject to removal for cause at the discretion of the board. Courts have ruled that there need not be an indictment, nor need the employee be granted a hearing, unless there is apparent abuse of action.[60] In spite of various court rulings on the legal aspects of procedures followed in discharging teachers, professional organizations of teachers have insistently urged, on ethical grounds, that action to discharge a teacher be taken only after the presentation of a written complaint and a fair hearing.

[58] People *ex rel.* Fursman v. City of Chicago, 278 Ill. 318, 116 N. E. 158 (1917).

[59] *Ibid.*

[60] Marion v. Board of Education, 97 Cal. 606, 32 Pac. 643 (1893); People *ex rel.* Danielwitz v. Harvey, 58 Cal. 337 (1881); Moran v. School Committee of Littleton, 317 Mass. 591, 59 N. E. 2d 279 (1945); Freeman v. Town of Bourne, 170 Mass. 289, 49 N. E. 435 (1898); Ladner v. Talbert, 121 Miss. 592, 83 So. 748 (1920); State *ex rel.* Truesdell v. Plambeck, 36 Neb. 401, 54 N. W. 667 (1893); State *ex rel.* Meckling v. Jaynes, 19 Neb. 161, 26 N. W. 711 (1886); State v. Palmer, 10 Neb. 203, 4 N. W. 965 (1880); Bays v. State, 6 Neb. 167 (1877); Miller v. Stoudnour, 148 Pa. Super. 597, 26 A. 2d 113 (1942); Heath v. Johnson, 36 W. Va. 782, 15 S. E. 980 (1892); Gillan v. Board of Regents of Normal Schools, 88 Wis. 7, 58 N. W. 1042 (1894).

Marriage as Cause for Dismissal.—A school board is within its rights to dismiss a teacher for statutory cause, and this is not reviewable by courts unless the board acts in bad faith, arbitrarily, corruptly, fraudulently, or in gross abuse of discretion.[61] The sex or marital status of a teacher may be taken into consideration,[62] but according to some courts to state that the marriage of a teacher is good and just cause for her dismissal, as a matter of law, is erroneous and invalid. There must be factors other than marriage to justify the dismissal of a teacher, and the board has a broad power in deciding other causes, so long as there is no abuse. In an Oregon case where a school board had forced a teacher to resign because she was getting married, the court ruled the action of the board to be unreasonable:

> The act to which the instant rule relates does not involve a single element of wrong, but, on the contrary, marriage is not only protected by both the written and unwritten law, but it is also fostered by a sound public policy. It is impossible to know in advance whether the efficiency of any person will become impaired because of marriage, and a rule which assumes that all persons do become less competent because of marriage is purely arbitrary. If a teacher is just as competent and efficient after marriage, a dismissal because of marriage would be capricious. If a teacher is neglectful, incompetent, and inefficient, she ought to be discharged whether she is married or whether she is single.[63]

Contracts Reserving Right of Dismissal on Marriage.—Other decisions just as firm have been rendered that the board is within its rightful privileges when it makes a rule which automatically dismisses a teacher upon marriage under certain conditions. By some judicial decision this is not an unreasonable ruling and does not corrupt the principle of law that no organization has the power to restrain marriage. Where a teacher's contract is expressly made subject to reasonable regulations, and the school board has passed a rule that any teacher who marries automatically terminates her contract, some courts have held that the board is within its rights to dismiss the teacher. The Supreme Court of Minnesota in *Backie v. Cromwell Consolidated School District* declared not unlawful a rule of the school board that, where the right to

[61] School City of Elwood v. State, 203 Ind. 626, 180 N. E. 471 (1932).

[62] Ansonage v. City of Green Bay, 198 Wis. 320, 224 N. W. 119 (1929).

[63] Richards v. District School Board, 78 Ore. 621, 153 Pac. 482 (1915); Kostanzer v. State *ex rel.* Ramsey, 205 Ind. 536, 187 N. E. 337 (1933); School City of Elwood v. State, 203 Ind. 626, 180 N. E. 471 (1932); People *ex rel.* Peixotto v. Board of Education, 82 Misc. Rep. 684, 144 N. Y. S. 87 (1914), *reversed,* 160 App. Div. 557, 145 N. Y. S. 853 (1914); Jameson v. Board of Education, 74 W. Va. 389, 81 S. E. 1126 (1914).

discharge teachers rests on reasonable rules made a part of the contract of employment,[64] no married teachers will be employed and that if a single teacher should marry her contract would hold only at the discretion of the school board. Nor may a teacher assert that she did not know about the rule if it was adopted by the board prior to the making of the contract employing her.[65]

The Supreme Judicial Court of Massachusetts on September 10, 1940, declared that it was within the discretionary powers of a board of school control to adopt a policy against the employment of married teachers in public schools, although such a policy should be gradually introduced to safeguard against causing hardships. The court further stated that it was within the policy-making power of the school board to make a rule that the marriage of a permanent woman teacher should operate as an automatic resignation, unless she can prove that she must still support herself. The exception in the rule of woman teachers who live apart from their husbands and receive no support from them or who have husbands mentally or physically incapable of providing support led the court to a conviction that the board was not discriminating against certain women. Furthermore,

> The rule is not unconstitutional as impairing the obligation of the petitioner's contract of employment. Her employment "at discretion" was always subject to the policy-making powers of the committee, to such rules as they might adopt in pursuance of those powers, and to the power of dismissal expressly set forth in the governing statute itself.[66]

Fraud by Teacher.—If, because of such rules against marriage as the board may have, a teacher promises a board that she will not marry during the time her contract is in force, or if the teacher is already married but applies for a position and is elected in her maiden name when the board has a rule against the employment of married teachers, the court will sustain the discretionary action of the board in dismissing the teacher.[67]

Dismissal of Teacher for Bad Conduct.—Laws in many states include immorality in the list of causes for which a teacher may be dismissed from his position. Courts have held that a school

[64] School Directors v. Ewington, 26 Ill. App. 379 (1887); Guilford School Township v. Roberts, 28 Ind. App. 355, 62 N. E. 711 (1902).

[65] Backie v. Cromwell Consolidated School Dist. No. 13, 186 Minn. 38, 242 N. W. 389 (1932); McGuire v. Etherton, 324 Ill. App. 161, 57 N. E. 2d 649 (1944); McQuaid v. State *ex rel.* Sigler, N. E. 2d 547 (Ind. 1937); Ansonage v. Green Bay, 198 Wis. 320, 224 N. W. 119 (1929).

[66] Houghton v. School Committee of Somerville, 28 N. E. 2d 1001, 1003 (Mass. 1940).

[67] Blair v. United States *ex rel.* Hellmann, 45 App. D. C. 353 (1906); Guilford School Township v. Roberts, 28 Ind. App. 355, 62 N. E. 711 (1902).

board has a broad discretion in deciding what constitutes sufficient cause to incriminate a teacher or to reflect upon his character to the extent that the alleged conduct becomes the common talk of the school community. A teacher may even be innocent, and yet have such notoriety through some known or unknown channel that his reputation becomes greatly damaged and his effectiveness impaired. Since a teacher's reputation in the community exerts some influence over his pupils, the courts have held that the board has a discretionary right to dismiss the teacher because retaining him would not be for the best interest and welfare of the community.[68] A teacher may be fitted from a physical, educational, disciplinary, or other standpoint, and yet not be acceptable to a community. In commenting, an Illinois Court of Appeals said in 1890:

> Ability to teach the branches prescribed by the statute does not alone qualify a person to teach our youth. In addition thereto, they should be persons who for their known virtue and morality are fitted to be trusted with the dearest treasures of the father and mother—the person and mind of their child. . . . If suspicion of vice or immorality be once entertained against a teacher, his influence for good is gone.[69]

Dismissal for Apparent Evil.—In 1931 a Kentucky Court of Appeals held that a board may use its discretion in determining what shall constitute conduct that may be questionable, and that when in its opinion a teacher's conduct is questionable, it may dismiss the teacher. For example, a male teacher who entered a school building one evening with young ladies without turning on the lights was justifiedly dismissed, according to the decision of the court. The young man and the ladies all stated that no immoral conduct took place and that, since the objects which they sought in the building were discernible by moonlight, the turning on of the lights was unnecessary. The board thought that the example set before the pupils was sufficient cause to term the behavior misconduct and to dismiss the teachers, and it was sustained in its action.[70]

TIME OF DISMISSAL OF TEACHERS

Notice of Dismissal.—In the absence of statutory right a school board does not have absolute authority or discretionary power to keep a teacher indefinitely in suspense concerning his contract. One court in California held that a teacher who according to statute should receive notice of nonemployment by June 10

[68] Freeman v. Town of Bourne, 170 Mass. 289, 49 N. E. 435 (1898); School-Dist. of Ft. Smith v. Maury, 53 Ark. 471, 14 S. W. 669 (1890).
[69] Tingley v. Vaughn, 17 Ill. App. 347, 351 (1885).
[70] Gover v. Stovall, 237 Ky. 172, 35 S. W. 2d 24 (1931).

but received no notice for the ensuing year prior to June 10 was still employed, notwithstanding the fact that another teacher ostensibly had been employed. The teacher in this case received on June 16 a notice which had been mailed on June 8, declaring that her former position was vacant. The court held that according to statute the board should have given the notice to the teacher personally or mailed it by registered letter before June 10; it therefore declared this to be an ineffective discharge, and the teacher was automatically re-elected for the next school year. The court ruled from law as follows:

It seems to us apparent from this authority and from the language of the act, that the legislative intent is manifest to give assurance to the teaching profession of some degree of certainty in their employment—something akin to civil service in other administrative branches of government. With this intent before us, having in mind that the statute provides that each teacher employed for one year shall be deemed re-employed, except discharged for cause after hearing, or in the case of a probationary teacher, by serving her a notice in writing on or before June 10th, we conclude that the intent and meaning of the law is as though it read: Permanent teachers cannot be discharged except for good cause after hearing, and probationary teachers cannot be discharged except for good cause after hearing, or by serving them with written notice on or before June 10, that their services will not be required for ensuing year.[71]

In several California cases courts have declared the dismissal valid if the board used any of many methods to convey the information to a probationary teacher just so long as it was official and received before June 10. The court does not hold that any one way is the only approved way. Thus a nonregistered letter notifying a teacher of the termination of his position before June 10 and acknowledged by the teacher was declared valid by the Third District Court of Appeals in California:

The manner of serving this notice, as suggested by the statute, is not mandatory. The important requirement is that the discharged teacher shall actually receive written notice of the termination of his services before the 10th day of June prior to the following school year. It would be frivolous to hold that the validity of the notice was destroyed because the envelope in which it was transmitted did not contain a registered stamp.[72]

[71] Blalock v. Ridgway, 92 Cal. App. 132, 267 Pac. 713, 714 (1928); Thibaut v. Key, 126 Cal. App. 32, 14 P. 2d 138 (1932); Owens v. Board of Education, 68 Cal. App. 403, 229 Pac. 881 (1924).

[72] Volandri v. Taylor, 124 Cal. App. 356, 12 P. 2d 462, 463 (1932); Steele v. Board of Trustees of Pittsburgh Public Schools, 121 Cal. App. 419, 9 P. 2d 217 (1932); Fleming v. Board of Trustees, 112 Cal. App. 225, 296 Pac. 925 (1931).

SUMMARY

1. A board of school control has a wide discretion in the election of teachers and is allowed great freedom so long as statutory regulations are observed.

2. Where there is no statute to the contrary, a board may use its authority in the employment of a teacher for one or more years; the term of employment may exceed that of some member of the board, and usually the term of employment may exceed that of the whole board.

3. A teacher or principal may not be given a contract which stipulates that he have a leave of absence with full or half pay.

4. A contract with a teacher may not be terminated at the discretion of a board without sufficient cause.

5. The board may use as a basis of selection for employment any qualifications of teachers provided statutory requirements are fulfilled. Taxpayers and voters may not coerce a board in the selection of a teacher.

6. So long as statutory regulations are abided by, a board may go beyond the prescribed regulations in determining the qualifications of a teacher.

7. Ordinarily a board has no discretionary power to select a teacher on the basis of his sex alone. Special duties to be performed by either a man or a woman, however, may be taken into consideration. Neither sex may be discriminated against.

8. A board has a broad discretion in the licensing and revocation of a teacher's license where the legislative power to do so has been delegated to the board.

9. In some states a board has no authority to pay the salary of a teacher for service rendered while he has no certificate, and in others a teacher must have a certificate at the time the contract is made in order that the contract be valid. Some decisions hold that a board may elect a teacher to a position before he has a certificate, provided the certificate is secured before he begins his work.

10. A board has no discretionary right to pay a teacher for services rendered after his certificate has expired.

11. When a teacher is entitled to a certificate but does not receive one until after his work has begun, the board may issue him a certificate dated back to the time he was qualified to receive it.

12. Broad discretionary powers may be exercised in regard to the fixing of salaries, provided statutory limitations are not exceeded. In some states the salaries of teachers must be fixed before the beginning of school.

13. Where a municipal corporation appropriates the money used for school purposes in a district, this corporation has no control over the school board either in the selection of teachers or the setting of their salaries.

14. Where statutes prohibit discrimination between the sexes, school boards have no right to make a wage scale which is based upon such discrimination.

15. Some courts have held that a board has no right to withhold payment of teachers who are not able to teach for a time when the board has ordered the school closed because of an epidemic, unless it is proved that the board is not responsible for the closing of the school.

16. If a building should be destroyed or damaged by fire during the school year, a board has no discretion in withholding a teacher's salary during the time the school is closed.

17. A board has no right to refuse to make an order for teachers' salaries, even though there is no money in the treasury, so long as there is statutory provision that teachers be paid by this medium.

18. Where statutes provide that a teacher's contract must be in written form, generally a teacher who does not have a written contract may not collect his salary or sue for breach of contract.

19. Where a teacher's contract was signed with a district before the beginning of the fiscal year, the teacher could not hold that the contract was valid after that district was annexed to an adjoining independent district.

20. If statutes stipulate only that a contract employing a teacher must be made by the board and must be in writing, the board has no right to revoke the contract on the grounds that the teacher has not signed it.

21. A teacher under permanent tenure may be dismissed for good cause but may not be dismissed for the reason that a decrease in the number of teachers employed is needed unless all nontenure teachers have first been removed.

22. Once a teacher attains permanent tenure under the conditions of statute, the board has no right to declare him otherwise if the statute is repealed or changed.

23. Where statute provides that a school board must give notice to a teacher when his services are no longer needed, the board may not authorize the superintendent of schools to notify the teacher. Unless the notice is received by a date specified in the statute, whether he is on permanent tenure or not, a teacher may claim employment for the following year.

24. If a teacher holds a life certificate, the school board may not revoke the certificate on the grounds of its own resolutions.

25. Boards of school control may make only such rules and regulations for teachers as are lawful and reasonable and for the welfare of the school.

26. A board has a right to make a regulation that a teacher shall reside in the school district, but it may not specify where in the district the teacher shall live.

27. A school board may assign to a teacher work other than that for which he is employed provided he is licensed to teach the subject or fitted to do the work.

28. Such rules and regulations concerning the health of the teacher as requirements for physical examinations and vaccinations are within the jurisdiction of a school board.

29. According to some decisions a board has a discretionary right to forbid a teacher to wear religious garb while at work in the schoolhouse, whereas other decisions declare that the board exceeds its discretionary power in attempting to regulate the dress of teachers.

30. The board has a right to forbid religious instruction in public schools when there is no statute to the contrary.

31. A board has a discretionary right to employ teachers of any religious faith, but religious faith in itself is not a just or reasonable cause for acceptance or rejection of a teacher's application.

32. Teachers may be required to give patriotic instruction and to co-operate with the school in using their influence on the moral education of pupils.

33. A teacher may be forbidden to take any political stand in an active manner while on duty at school, but outside of the classroom he may engage in any political activities he cares to.

34. There is a difference of opinion as to whether a board has the discretionary right to dismiss a woman because of marriage or to refuse to employ a married woman teacher, but the preponderance of opinion is opposed to the dismissal of a teacher for this reason alone.

35. A board of school control has no legal right to cause an amount to be deducted from a teacher's salary to accrue to his retirement fund without the teacher's permission or to make a proviso in the contract of a teacher that automatically makes his salary subject to a deduction.

36. Some courts have held that where there is no law to the contrary, a teacher may be forbidden to join a labor union or any other union affiliated with a labor union if a board of school control believes such an act to be against the welfare of the school. Public sentiment against such decisions is growing stronger at present.

37. A board may use its discretion in determining what shall constitute sufficient cause to dismiss a teacher, so long as there is no abuse of discretion. Courts have ruled that there need not be an indictment or a hearing unless there is apparent abuse of discretion, but professional organizations have urged that teachers not be dismissed without a written complaint and a fair hearing.

38. In most jurisdictions the view is taken that the marital status of a teacher cannot be a just and reasonable cause for dismissal; but where a teacher's contract contains a clause that the marriage of a woman teacher automatically terminates the contract, some courts have held that the rule is not unreasonable.

39. If a teacher signed her maiden name to a contract which stipulated against the employment of married teachers and falsely posed as a single woman, she can be dismissed on the grounds of fraud.

40. In California, where statute provides that a teacher must receive notice of dismissal before June 10 of each year, courts have ruled that if the notice is delivered in person or sent by registered mail or in any other way reaches the teacher before this date, the dismissal is effective; otherwise the teacher is automatically re-employed for the next school year.

CHAPTER XI

Powers of Boards of School Control Concerning Employees Other than Teachers and Superintendents

NECESSARY ASSISTANTS

A SCHOOL BOARD is empowered by law to exercise a wide discretion in the employment of the necessary aid to assist in the construction, maintenance, and operation of a school plant and to perform other duties which are necessary for the efficient administration and supervision of a school.

Restrictions in Employment.—Although the school board may use its discretionary authority to employ the necessary assistants to carry out a desired program, many restrictions are placed upon a board in regard to whom it may employ, the manner in which a contract is written, the salary that is permitted to be paid, and the length of employment that may be fixed.

EMPLOYMENT OF ARCHITECT

Selection of Architect.—It is not considered a waste of funds for a board of school control to use its judgment in the employment of a particular architect or firm of architects for the construction of a building, even though another architect or firm of architects might be secured at a much more modest price. A board has a perfect right to determine the personal elements involved in the ability, training, experience, and integrity of the architect or firm of architects selected. Unless there is sufficient proof that fraud or other irregularities were present in the choice of an architect, the court will not interfere. According to a Tennessee court decision, the board has discretionary power in this matter:

> Nor is it to be considered a waste of public funds that a firm of architects was employed at a 6 per cent. commission, when other architects could be employed for a commission of 4 per cent. The personal element involved in the ability, training, experience, and integrity of the architect selected, presumably considered by the committee in making the selection, must be treated as justifying the contract to pay the larger commission. Whether other architects could

be found who would render "just as good service" for a smaller commission, must be left to the administrative officers in charge of the building program.[1]

Silence of a Board Member Counted an Affirmative Vote.—A Missouri statute states that to employ a person a quorum of the board shall be present, and an affirmative majority vote of those present must be cast. This rule holds not only in Missouri, but almost universally. In a meeting of a board of school control to consider the employment of an architect, five of the six members were present. After discussing various architects, the board proceeded to elect one, as it had a discretionary power and privilege to do. Only three of the five members present cast a ballot. The president and secretary signed a valid contract with the architect for whom three of the board members present voted. Later the board revoked the contract, stating that since only three members voted affirmatively for the person to whom the contract had been given, the contract was invalid. The Kansas City Court of Appeals held that as the president and secretary did not vote, their silence was sufficient cause to cast their vote affirmatively, and that the board had no statutory or discretionary right to repudiate its former action. Therefore, the contract would hold and the architect could collect his fee.[2]

EMPLOYMENT OF ASSISTANTS

Office Help.—If the duties of a superintendent of schools are so heavy that he does not have time to devote to routine work, and if he cannot possibly do justice to his office without assistance, a school board may employ the necessary clerical help to assure efficient service and allow the superintendent to attend to the important duties of administration and supervision of the schools.[3]

Employment of Custodian.—A West Virginia Court of Appeals ruled that, according to statute, a board of school control has neither authority nor discretionary power to employ a trustee or a custodian for school property at a fixed salary, but that a trustee may receive remuneration for serving as custodian in addition to other duties. On December 12, 1931, the Supreme Court of Appeals of West Virginia gave the following decision:

[1] State *ex rel.* v. Brown, 159 Tenn. 591, 21 S. W. 2d 721, 722 (1929); Parks v. Margraves, 157 Tenn. 316, 7 S. W. 2d 990 (1928); Collins v. Janey, 147 Tenn. 477, 249 S. W. 801 (1923).

[2] Bonsack & Pearce v. School Dist. of Marceline, 226 Mo. App. 1238, 49 S. W. 2d 1085 (1932); Cole County v. Central Missouri Trust Co., 303 Mo. 222, 257 S. W. 774 (1924); Edwards v. City of Kirkwood, 147 Mo. App. 599, 127 S. W. 378 (1910); Simpson v. Stoddard County, 173 Mo. 421, 73 S. W. 700 (1903).

[3] Beauchamp v. Snider, 170 Ky. 220, 185 S. W. 868 (1916).

The taxpayer should not be called upon to carry the burden of duplication of service in the public school system.[4]

Dismissal of Assistants.—When there is no statutory or other authority, a board cannot use the broad discretion vested in it to dismiss a subordinate to the superintendent of schools without the recommendation of the superintendent. In a case in the District of Columbia a matron made application for a year's leave of absence to recover health. The board had a rule that when an employee took a leave of absence, his contract terminated; but that after the leave of absence had been taken, consideration would be given the person in question for the first available position for which he was qualified. In passing judgment on this case the District of Columbia court said that according to a District of Columbia code:

> It is contended that the board was without authority to dismiss plaintiff and terminate her service except upon a recommendation of the superintendent of schools, and that no such recommendation was made in this case, and that the foregoing rule under which the board acted is in conflict with the organic law, . . . which provides as follows: "No appointment, transfer, or dismissal of any director, supervising principal, principal, head of department, teacher, or any other subordinate to the superintendent of schools, shall be made by the Board of Education, except upon the written recommendation of the superintendent of schools."[5]

In this case the superintendent had not given a recommendation for dismissal of the employee, and she was given judgment against the board.

CONTRACTS FOR TRANSPORTATION

Duty of Board to Transport Children.—Where a statute holds the board of school control responsible for the transportation of children to and from school and requires it to advertise for and employ school bus drivers, but leaves to the board's discretion the method of transportation and the schools to which the children are to be transported, the board cannot expand the statutory delegation of power.[6]

Necessity for Proper Authorization.—A board of school control has no right to contract for transportation in advance of legal authority and appropriations therefor. Any contract entered into

[4] De Bell v. Goodall, 111 W. Va. 589, 161 S. E. 612 (1931).

[5] Whitwell v. United States *ex rel.* Selden, 58 F. 2d 895, 896 (App. D. C. 1932); Blair v. United States *ex rel.* Hellmann, 45 App. D. C. 353 (1906).

[6] California School Township, Starke County v. Kellogg, 33 N. E. 2d 363 (Ind. App. 1941); Bruggeman v. Independent School Dist. No. 4, 289 N. W. 5 (Iowa 1939).

without such proper authorization is null and void. The board does, however, have broad contractual powers.[7]

Letting Contract for Transportation.—Awarding a contract to a bidder for transportation is not merely a ministerial act, but requires a sound exercise of judgment in determining the best responsible bidder. If there are no bidders whose qualifications are acceptable to a board of school control, the board may use its discretion in throwing out all bids and in accepting other ones. The board may demand of a bidder evidence of ability, capital, character, experience, and other qualifications that are necessary according to the judgment of the board before it awards a contract. According to the sane judgment of the board, the lowest and most responsible bidder is not necessarily the person who submits the lowest bid. The person who is best fitted in respect to moral integrity, ability to drive a bus properly and safely, essential power to control a group of children intrusted to his care, and a true conception of the obligations of punctuality and regularity in the operation of the school bus is the person to whom the board should give a contract for the transportation of children in the school district.[8]

Bus Driver as District Employee.—In 1931 a California district court of appeals held that a contractor for the transportation of pupils, since he did not have authoritative control in performing his work, was an employee of the district and that the district was liable in case of accident. Where a school board reserves power to terminate at will a contract for the transportation of pupils, the driver is not an independent contractor but an employee of the district:

> We are of the opinion that under the foregoing contract the jury was justified in finding the driver was the employee of the district. The primary consideration which leads to this conclusion is the right reserved by the district to terminate the agreement at will. It is not the actual exercise of control, but the right of control—that is to say the potential power of control—which is important in a determination of whether or not the status of an employee or independent contractor exists.[9]

The power to discharge at will negates existence or retention of an independent contractor.

[7] Application of Huntington Coach Corp., Suffolk County, 256 App. Div. 184, 9 N. Y. S. 2d 483 (1927).

[8] Lee v. Browning, 96 Ind. App. 282, 182 N. E. 550 (1932); Hutto v. State Board of Education, 165 S. C. 37, 162 S. E. 751 (1932).

[9] Smith v. Fall River Joint Union High School Dist., 118 Cal. App. 673, 5 P. 2d 930, 933 (1931); Brown v. Industrial Accident Commission, 174 Cal. 457, 163 Pac. 664 (1917); Claremont Country Club v. Industrial Accident Commission, 174 Cal. 395, 163 Pac. 209 (1917).

Responsibility of Employer.—Therefore if a board of school control reserves the right to terminate the employment of a driver at any time, the board is liable in case an accident should occur in a collision or otherwise on a bus transporting children. The board cannot hold the bus driver financially and legally responsible; since it is accountable for the acts of the driver, the responsibility rests with the board.

Personal Liability of School Committeemen.—It was held by the Supreme Court in North Carolina in 1932 that if the school committee acted corruptly or maliciously in employing a bus driver, the committeemen are held personally responsible for any accident that might occur:

> The law as generally administered recognizes a distinction between public duties which require the exercise of judgment or discretion. This court has held that as a rule a private action for tort cannot be maintained against an agency of the state, but, for the negligent breach of a public duty which is administrative and imposed entirely for the public benefit, an officer may be held individually liable to a person who has been injured by his negligence if the statute creating the office or imposing the duty makes provision for such liability. It has been held that, where the powers conferred upon a public officer involve the exercise of judgment or discretion, he is not liable to a private person for neglect to exercise such powers or for the consequences of the lawful exercise of them if he acts within the scope of his authority and without malice or corruption.
>
> . . . If the committeemen were not actuated by malice or corruption, there can be no recovery. . . .[10]

HEALTH EMPLOYEES

Employment of Nurses and Others for Health Work.—Unless there is statutory provision to prohibit such action, a school board may use its discretion to employ a nurse and others engaged in health work for the best interests of the school. The board is further empowered to make such appropriation as is necessary to defray the expenses of such employees, if there are funds in hand not otherwise appropriated by law.[11] Since it is the bounden duty of the schools to supervise, to guide and direct, to guard and protect the health and physical growth and development of all pupils, courts have ruled that it is not only rightful but obliga-

[10] Betts v. Jones, 203 N. C. 590, 166 S. E. 589, 590 (1932); Spruill v. Davenport, 178 N. C. 364, 100 S. E. 527 (1919); Hipp v. Farrell, 173 N. C. 167, 91 S. E. 831 (1917).

[11] Board of Education of Bowling Green v. Simmons, 245 Ky. 493, 53 S. W. 940 (1932); Hockensmith v. County Board of Education, 240 Ky. 76, 41 S. W. 2d 656 (1931); Estill County v. Wallace, 219 Ky. 174, 292 S. W. 816 (1927); Barrow v. Bradley, 190 Ky. 480, 227 S. W. 1016 (1921).

tory to employ people to carry out this duty in the interest of the pupils.[12]

Qualifications.—Where a statute does not specify the qualifications of a school nurse, a teacher of physical education, or a teacher of health, the board may exercise its judgment in the selection of these employees.[13]

EMPLOYMENT OF COUNSEL

Liberty in Employing Counsel.—In some jurisdictions there is a statutory provision whereby a particular legal officer is to appear for a board of education if there should arise any occasion for counsel. If there is no direct statutory authority giving a board expressed power to employ an attorney, this power may sometimes be implied. In this connection, the Court of Civil Appeals in Texas, 1917, stated:

> . . . having the power, as trustees have by the terms of the statute, to contract and to sue and be sued in the courts, the authority on the part of trustees to employ an attorney to institute and prosecute an action in their behalf would exist as a necessary incident of the powers to contract and to sue and to manage and control the affairs and interest of the public school . . . the authority would exist to pay such attorney reasonable compensation out of the special maintenance school fund in the management and control of the trustees.[14]

In San Francisco, however, where statute provides that the city attorney serve the board in case of need, a different opinion was expressed by the Supreme Court of California in 1903:

> We are of the opinion that neither boards of education nor boards of school trustees have the implied power to employ an attorney at the expense of the city or school district.[15]

Extent of Power.—In the employment of counsel, a board may use its discretion legally only when suit is brought against it concerning a public interest which the board is charged by law with duty to protect. For example, an attorney was employed to defend a suit instituted against the board by a person who sought to gain a seat on the board. In refusing the application for a writ of mandamus to compel the city superintendent to issue a

[12] Alexander v. Phillips, 31 Ariz. 503, 254 Pac. 1056 (1927); Hallett v. Post Printing & Publishing Co., 68 Colo. 573, 192 Pac. 658 (1920); Crane v. School Dist. No. 14, 95 Ore. 644, 188 Pac. 712 (1920); McGilvra v. Seattle School Dist. No. 1, 113 Wash. 619, 194 Pac. 817 (1921).

[13] Board of Education of Bowling Green v. Simmons, 245 Ky. 493, 53 S. W. 940 (1932).

[14] Arrington v. Jones, 191 S. W. 361, 362 (Tex. Civ. App. 1917).

[15] Denman v. Webster, 139 Cal. 452, 73 Pac. 139, 140 (1903).

warrant for payment of services rendered by the attorney who defended the case, the Supreme Court of California in 1903 said:

Merely because someone chooses to make the board of education a party defendant in an action or proceeding, it does not necessarily follow that some interest of the city is involved, or that the board must defend. Whatever powers and duties a board may possess, it is not one of its functions to litigate as a board the question who are entitled to seats as members of the board. . . . Regardless of all other questions involved, the board, having no function to perform in the matter, could not legally require the services of the city attorney, or employ counsel at the expense of the city.[16]

Illegal Employment of Counsel.—Where the statutes grant power to the boards to employ counsel in actions brought by or against the district, the courts hold that this authority will be strictly limited to the powers granted. For example, according to the Supreme Court of Iowa in 1894, a board does not have discretionary power to employ legal advice to defend a suit brought against the board by a taxpayer for alleged fraud in erecting a school house.

Now, bearing in mind the fact that this suit was brought against the directors to restrain them from doing an illegal act,—from consummating a fraud upon the district,—and that these directors, if not active parties to the fraud, were guilty of the grossest neglect and carelessness in the performance of their duties, does the law contemplate that they shall have power to bind the district by issuing orders, to pay attorneys and stenographers for services, not in defending a suit for the benefit of the district, but in defending acts of their own, which, when done, they knew were improper, if not fraudulent, and about the impropriety of which there could be no question? We think not.[17]

SUMMARY

1. A board of school control is invested with discretion to employ necessary assistants for the efficient administration and supervision of a school.

2. A board may exercise its judgment in determining what the qualifications of an architect must be before he is employed by the board.

3. A Missouri decision states that where five out of six members of a school board were present at a meeting, with three vot-

[16] *Ibid.;* Templin & Son v. District Township of Fremont, 36 Iowa 411 (1873); Byrne & Read v. Board of Education, 140 Ky. 531, 131 S. W. 260 (1910); Johnson v. Troy, 19 Hun 204 (N. Y. 1879); Commonwealth v. Kerr, 25 Pa. Co. 645 (1901).

[17] Scott v. Independent Dist. of Hardin, 91 Iowa 156, 59 N. W. 15, 16 (1894).

ing for an architect and two not voting at all, the ruling court held that those not voting should be counted as having voted affirmatively, and that the contract could not be revoked.

4. Within reason and statutory limit the board has the right to employ the clerical assistants necessary for a superintendent's office.

5. A West Virginia court held that a custodian of school property may not be employed at the discretion of the board, that no stipulated salary may be paid an extra employee for such service, but that custodial service should be provided by regularly employed help serving as custodian in addition to other duties.

6. Where there is a statute that empowers the superintendent to recommend all applicants for positions or to make recommendation for dismissal, a board does not have the right to dismiss an employee without recommendation from the superintendent.

7. In contracting for transportation service to and from schools a board may, provided it has statutory authorization and appropriations for doing so, use its discretion as to the qualification of bus drivers and as to accepting the most responsible as well as the lowest bidder.

8. Where a school board reserves the power to terminate at will a contract for the transportation of pupils, the driver is not an independent contractor but an employee of the district and the district is liable in case of accident.

9. If a school board acts corruptly or maliciously in employing a bus driver, the board members are held personally responsible for any accident that might occur.

10. Unless prohibited by statute a board may use its discretion in employing and paying the salary of a school nurse and others engaged in health work for the best interest of the school.

11. Where statute does not specify the qualifications of a school nurse, a teacher of physical education, or a teacher of health, the board may use its own discretion in the selection of these employees.

12. If statutes do not specify a particular legal counselor to represent the board of education in legal matters, the board is generally free to employ an attorney at its own discretion and to pay for his services out of the special maintenance fund, so long as counsel is necessary in serving the public interest.

13. The board is not, however, given authority to employ an attorney to defend it in a legal suit which the board does not have to defend because it is not concerned with the interests of the district.

CHAPTER XII

Powers of Boards of School Control to Transport Pupils

THE obtaining of bids, letting of contracts, and employment of bus drivers for the transportation of pupils discussed in the preceding chapter will not be reviewed here, but only the phases of transportation concerned with the pupils to be transported.

GENERAL POWERS OF BOARD

The furnishing of transportation for pupils of a school district is discretionary with a board of school control except when it is left to the vote of the electors of the district, when a school has been abandoned, when two or more districts have been consolidated, or when part of a district has been annexed to another district.[1] The determination by the school board of the schools to which it will transport pupils and the methods of transporting them are largely matters of discretion provided there is no conflict with statutory regulations and no abuse of power.[2] Precedents do not have to be followed in matters of transportation; where a board is given power to determine whether to furnish transportation and pay for it out of county funds, regardless of the policy that has been established, it may at any time change its policy.[3]

MANDATORY TRANSPORTATION OF PUPILS

Where a district votes transportation upon itself, a board does not have discretionary authority to violate the people's mandate regarding transportation. The intention of the legislatures in passing laws concerning transportation is to impose an absolute

[1] State *ex rel.* Millsap v. Stoddard, 108 Neb. 712, 189 N. W. 299 (1922); Commonwealth v. Penns Township School Directors, 31 Pa. Co. 552 (1904); *In re* East Hopewell Township School Dist., 7 Pa. Dist. 177 (1898); Harris v. School Dist. No. 48, 32 S. D. 544, 143 N. W. 898 (1913); Town of Wallingford v. Town of Clarendon, 81 Vt. 245, 69 Atl. 734 (1908).

[2] People v. Board of Education, 26 Ill. App. 476 (1887); Jackson School Township v. State, 204 Ind. 251, 183 N. E. 657 (1932); Doyal v. Waldrop, 37 N. M. 48, 17 P. 2d 939 (1932); *In re* School Directors of Lower Salford Township, 19 Pa. Co. 264 (1897); Commonwealth v. School Directors, 4 Pa. Dist. 314 (1895).

[3] Gragg v. County Board of Education, 200 Ky. 53, 252 S. W. 137 (1923).

duty upon boards of school control to carry out the wish of the voters of the community.[4]

TRANSFER OF PUPILS

Transportation of Pupils to an Adjoining District.—In states where a board may use its discretionary power to send children from one district to another adjacent thereto, if the board decides that children in one district have so great a difficulty of access to schools in the district that they should be sent to a more convenient school in an adjoining district, unless it is shown that the children are unduly inconvenienced by such action or that the board has otherwise seriously abused its discretion, the courts will not question the board's decision. If either of the districts should fail to provide proper transportation in an exchange of pupils or if for any other reason one of the districts should object to the transfer on reasonable grounds, the board of that district might refuse the transfer.[5]

Transportation of Pupils in Case of Consolidation.—Evidence in a Kentucky case led the court to rule that it is an abuse of discretion for a school board to consolidate two or more school districts into one district without providing transportation for all pupils who are too far from the central location to be within convenient walking distance. Any legislative action that provides for the consolidation of schools carries with it the authorization that the board in whatever district the school is consolidated is empowered to provide, out of the taxes levied and collected, transportation of the pupils to and from school.[6] At the same time the school board has a broad discretion in working out the details involved in the transportation of the pupils.

Transportation of Children beyond the County Line.—A school board may provide transportation for children across county lines to an adjoining district. According to a ruling by the Supreme Court of Georgia in 1932 if a school in another county is more accessible than any school in the county of the children's residence, the sensible thing to do is to transport the children to the adjoining county. In a case of this kind county

[4] Supervisors v. United States, 4 Wall. 435 (U. S. 1866); Bowen v. Minneapolis, 47 Minn. 115, 49 N. W. 683 (1891); State *ex rel.* Greaves v. Henry, 87 Miss. 125, 40 So. 152 (1906); State *ex rel.* Millsap v. Stoddard, 108 Neb. 712, 189 N. W. 299 (1922).

[5] Edwards v. State *ex rel.* Kisling, 143 Ind. 84, 42 N. E. 525 (1895); Commonwealth v. Penns Township School Directors, 31 Pa. Co. 552 (1904); Patterson v. School Directors of Cecil Township, 24 Pa. Co. 574 (1898); *In re* East Hopewell Township School Dist., 7 Pa. Dist. 177 (1898).

[6] Knox County Board of Education v. Fultz, 241 Ky. 265, 43 S. W. 2d 707 (1931).

lines do not hold precedence over the proximity of the school in the interest of the children who attend the school.[7]

Transportation of Pupils of Different Races.—For the most part the rules and regulations applicable to the transportation of all races in this country are identical, but local conditions in some states occasionally give rise to problems. In states where legislative enactment allows the provision of separate schools for different races, individual pupils sometimes give rise to a problem in transportation. On February 8, 1930, the Supreme Court of Kansas said that if transportation were furnished without cost to the pupil or her parents, the transfer of a Negro pupil from a white to a Negro school at a much greater distance from the pupil's home, necessitating crossing many city streets where automobile traffic was heavy, could not be enjoined. Where separate schools for white and Negro children are required or established by constitution or statute, the right of a pupil to be admitted to public schools is restricted to the school of the pupil's race, provided that school facilities and transportation permit no discrimination.[8]

PRACTICABILITY OF TRANSFER

Sufficient Cause for Transfer.—When a pupil requests a transfer to a different school from that which he is attending, the board may use its discretion in granting the request. So long as there is no statutory provision to circumscribe the discretionary action of the board, it may deny to a pupil the transfer requested although the school to which he wishes admittance is better, nearer, and more convenient. If the board believes that a pupil is sufficiently accommodated by his present arrangement, that the change would handicap the school which the pupil desires to leave, and that the distance and difficulty of access are not sufficient to require the change, the decision of the board will not be enjoined.[9]

Individual-Case Consideration.—Each request for transfer should be considered separately when pupils wish to be taken from one school or district to another. When each case has been considered upon its individual merits, a board may use its discretion in determining what may be done so that no unduly heavy burden is attached to the district for unquestionably foolish transportation.[10]

Impracticable Transportation.—In territories which are sparsely populated sometimes a pupil lives at such a great distance

[7] Fitzpatrick v. Johnson, 174 Ga. 746, 163 S. E. 908 (1932).

[8] Wright v. Board of Education of Topeka, 129 Kan. 852, 284 Pac. 363 (1930); Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274 (1903); Board of Education of Topeka v. Welch, 51 Kan. 692, 33 Pac. 654 (1893).

[9] Freeman v. School Directors of Franklin Township, 37 Pa. 385 (1860).

[10] *Ibid.;* Edwards v. State *ex rel.* Kisling, 143 Ind. 84, 42 N. E. 525 (1895).

from a school building that the expense of providing transportation for him would be unreasonable. The cost of transporting such a pupil would be wholly out of proportion to the amount which could properly be expended per pupil in the district and might deprive many other pupils of the advantages of transportation. Accordingly, in 1912 the New Hampshire Supreme Court decided that a board acts in a sensible way when it refuses to provided transportation under such conditions and that the use of its discretionary powers will not be questioned by the court.[11] Nevertheless, in theory at least, every child should have access to public-school facilities.

SUMMARY

1. The furnishing of transportation for pupils of a school district is discretionary with a board of school control except when statutes make other provisions. The determination of the schools to which pupils will be transported and the method of transportation is largely left to the discretion of the school board. Established policies in transportation do not have to be followed by a school board.

2. It is mandatory upon a school board to furnish transportation for pupils in a district which votes transportation upon itself.

3. In states where a board may use its discretion in transferring children from one district to another, the board's decisions in matters of transfer if reasonable are final. If one of the districts involved in the transfer objects on reasonable grounds, however, the board of that district is free to refuse the transfer.

4. If statute allows the consolidation of school districts, it carries with it the understanding that school boards will provide transportation for all pupils who are too far from the central location to be within convenient walking distance.

5. Pupils may be transported beyond county lines to an adjoining district. County lines do not hold precedence over the proximity of the school which pupils must attend.

6. Where there is provision for separate schools for different races, school boards may require the pupils of different races to attend their respective schools provided that school facilities and transportation permit no discrimination.

7. If a pupil requests transfer to another school, the school board may use its discretion in granting his request.

8. Each individual request by pupils for transfer must be considered separately by a board in deciding whether or not it will grant the transfer.

9. In some cases it is impracticable to provide transportation for a pupil who lives at a great distance from the school.

[11] Fogg v. Board of Education, 76 N. H. 296, 82 Atl. 173 (1912).

CHAPTER XIII

Powers of Boards of School Control in Regard to Pupil Attendance

ADMISSION OF PUPILS

Admission of First-Year Pupils.—Unless there is a statutory regulation to the contrary, and none has been found in all the cases reviewed in this study, a board of school control has the power to make reasonable rules for first-year pupils, provided such rules do not permit too much interference with established classes and do not deprive any child of school privileges for an unreasonable length of time. Within the same state school boards may make rules which differ considerably as to the age of the pupil and the time at which he may enter school. Some boards allow pupils to enter before six years of age, some allow pupils to enter at six, and others allow pupils to enter at seven. One board may allow only annual admissions, another may allow semiannual admissions, while another may allow quarterly admissions—yet all will be within the discretionary privileges accorded them in the matter of setting up rules concerning admission of pupils.

A school board may, at its discretion, formulate a rule requiring that beginners enter the first grade only during the first six weeks of each half term. In 1911 such a rule was upheld by a decision of the Supreme Court of Missouri, whose contention was that a board has the right to make such a rule for the orderly conduct of the school, even though it may deprive some pupils temporarily of the facilities of the school.[1]

On the other hand the Appellate Court of Illinois in 1899 stated that a rule forbidding children to enter school except during the first month of the fall and spring terms was unreasonable, since it deprived the child of the free school for five or six months.[2]

Child Expelled from Another District.—When a pupil who has been expelled from a school for committing some offense makes application for admission to another school, a board does not have

[1] State *ex rel.* Ranney v. School Dist. of Cape Girardeau, 237 Mo. 670, 141 S. W. 640 (1911).

[2] Board of Education v. Bolton, 85 Ill. App. 92 (1899).

the right to refuse to admit the pupil. In rendering decision, the Supreme Court of Arkansas in 1920 held:

> Neither the teacher nor the board nor both combined had authority to prescribe, as a condition precedent to his right to enter the school in that district, that he should first atone for past offenses committed against some other district. Ex post facto rules and laws are contrary to the letter of our constitution, as well as the genius of our institution.[3]

Physical Examination.—When a child presents himself for admission to a school, the board has discretionary power to require as a condition precedent to admission that the pupil must furnish a physical report based on an examination by the school physician or by a physician acceptable to the board. Such a rule has been held valid because it is democratic in principle, and no child should be excluded from school except those children who rightfully should be excluded in order to safeguard the health and physical welfare of the group as a whole. The Supreme Court of South Dakota in 1914 stated the following:

> Under the regulation complained of, no person is excluded from the school, except upon his own volition. . . . The report asked for would lead to the exclusion of the pupil only when it showed that the child was not of school age, that it was not a resident of the district, or, if the respondents so ordered, when it showed that the child was then suffering from some disease rendering it a menace to its associates.[4]

Physically Deformed Children.—A Wisconsin court has held that a school board has a right to make a rule that children who are so afflicted with physical or mental deformity or any other personal impediment as to be a serious distraction to other pupils and the teachers should not be admitted to regular class work, but should be taken care of in a special school provided for physically defective children. In 1919 the Supreme Court of Wisconsin held that the general welfare and not a private or individual benefit is paramount in the management of the public-school system.[5]

ESTABLISHING SCHOOL RESIDENCE OF PUPIL

Assigning Children to School.—A board has a wide discretion in making decisions concerning the school which a pupil should attend. Many conditions surrounding the child may be taken

[3] Stephens v. Humphrey, 145 Ark. 172, 224 S. W. 442, 443 (1920).

[4] Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, 781 (1914).

[5] State *ex rel.* Beattie v. Board of Education, 169 Wis. 231, 172 N. W. 153 (1919).

into consideration, such as how near the child lives to the school, whether the attendance of the school makes it overcrowded, how easy it is for the child to reach the school, and the like, and the board must exercise care and seriously consider the advantages and disadvantages before a final decision is made concerning the school to which the child must go.[6]

ATTENDANCE OF PUPILS

Power of Board to Formulate Rules.—In almost every state within the United States there is some form of compulsory-attendance law concerning the attendance of pupils in public schools. In connection with this attendance law the various boards of school control are vested with a discretion in the formulation of such rules and regulations as will best serve the public welfare and assist in the enforcement of the law.[7]

Tardiness.—Courts have held that it is reasonable for a board of school control to use its discretion in making rules against tardiness of pupils, since a child's entering school late is disturbing to others and is detrimental also to the child's own progress. In one instance in 1887 an Indiana Supreme Court held as not unreasonable a rule that a door to a classroom should be locked for the duration of the opening exercise, and stated that the child could be required to remain either in the principal's office or in a heated hall during that time.[8] Another court held that such a rule need not be a matter of record with the board, unless the board should choose to make a record of it. The Supreme Court of Massachusetts stated in 1874:

> The school committees are required to have the general charge and superintendence of all the public schools in town, and to keep a record of their votes, orders and proceedings. . . . But this does not imply that all rules and orders required for the discipline and good conduct of the schools shall be a matter of record with the committee, or that every act in regard to the management of each school in these respects should be authorized or confirmed by formal vote.[9]

Leaving School Grounds.—A board has discretionary authority to rule that a pupil shall not leave the school grounds during

[6] People *ex rel.* Dietz v. Easton, 13 Abb. Pr. (N. S.) 159 (N. Y. 1872); Board of School Inspectors of Peoria v. People *ex rel.* Grove, 20 Ill. 526 (1858); *In re* York Township School Dist., 10 Pa. Dist. 687, 15 YORK LEG. REC. 74 (1901).

[7] Fertich v. Michener, 111 Ind. 472, 11 N. E. 605 (1887); Churchill v. Fewkes, 13 Ill. App. 520 (1883); Burdick v. Babcock, 31 Iowa 562 (1871); Russell v. Inhabitants of Lynnfield, 116 Mass. 365 (1874); King v. Jefferson City School Board, 71 Mo. 628 (1880); Ferriter v. Tyler, 48 Vt. 444 (1876).

[8] Fertich v. Michener, 111 Ind. 472, 11 N. E. 605 (1887).

[9] Russell v. Inhabitants of Lynnfield, 116 Mass. 365, 367 (1874).

the school day without authority from the teacher to do so. In reaching this decision the Supreme Court of Alabama in 1924 reasoned that inasmuch as teachers are responsible for the discipline of the school, it is only reasonable that any permission to leave should rest in the hands of the teacher.[10]

ADULT ATTENDANCE

If a pupil over twenty-one years of age should enter school, he does so by his own voluntary act. He cannot compel his admission, however, unless there should be statutory provision enabling him to do so, and so far there is no such law. If and when a person over twenty-one years of age enters school, he must come under the rules and regulations of the school, and while in school is amenable to the same punishment as pupils of school age.[11]

ATTENDANCE OF MARRIED PUPILS

The public schools of the United States were organized to educate pupils between given ages. There is no statutory regulation against the attendance of married boys and girls, and a board of school control has no discretionary right to discriminate against married pupils within the prescribed age limit by refusing them admittance to public schools. The Supreme Court in Mississippi in 1929 held that while a board of school control may make such rules and regulations as it thinks best for the conduct of the school, a rule debarring a pupil from school because of marriage is unreasonable, arbitrary, and an abuse of the discretion:

> Marriage is a domestic relation highly favored by the law. When the relation is entered into with correct motives, the effect on the husband and wife is refining and elevating rather than demoralizing.[12]

SUMMARY

1. A board of school control has a wide discretion concerning the age at which first-year pupils may enter school.
2. If a pupil is dismissed from one school and requests admission to another school, a board does not have discretionary power to refuse him admittance.
3. School boards have a wide discretion in formulating and enforcing health regulations for children being admitted to school.

[10] Christian v. Jones, 211 Ala. 161, 100 So. 99 (1924); Flory v. Smith, 145 Va. 164, 134 S. E. 360 (1926).

[11] State v. Mizner, 45 Iowa 248 (1876); Stevens v. Fassett, 27 Me. 266 (1847).

[12] McLeod v. State *ex rel.* Miles, 154 Miss. 468, 122 So. 737, 738 (1929); Nutt v. Board of Education, 128 Kan. 507, 278 Pac. 1065 (1929).

4. A child who is greatly handicapped mentally or badly deformed physically may be excluded from public school.

5. A board has a wide discretion in assigning pupils to schools.

6. Boards of school control may formulate and enforce such rules and regulations for the general welfare of pupils as those concerning attendance and tardiness in school and leaving the school grounds.

7. It is discretionary with school boards as to whether they accept adult pupils, but if adults are accepted as pupils they must abide by rules and regulations set up for regular pupils.

8. A school board may not debar married pupils from attending public schools.

CHAPTER XIV

Powers of Boards of School Control in Regard to Discipline

RULES FOR DISCIPLINE

It is generally understood that it is the duty of a school board to make such rules and regulations for the discipline of a school as will be conducive to good behavior of and healthy atmosphere for the pupils. Accordingly the board may use its judgment in the determination of such rules as it believes to be for the best interest of the school and community, so long as there is no abuse of power. Courts usually hold that rules are essential to the training of pupils, the disciplinary order of the school, and the success of instruction.

There are often differences of opinion in reference to the authority of a school board to regulate the conduct of the pupils beyond the premises of the school; courts are universally of one accord, however, in the opinion that boards may exercise broad discretionary powers of discipline and that rules for the conduct of pupils while under the direct supervision of the school are not to be declared void unless plainly unreasonable, unjust, or contrary to law.

General Misconduct.—There is in all public schools an unwritten code of decency and deportment that every pupil is expected to realize and to abide by, which involves personal liberty—so long as it is compatible with that of others—the rights of others, and attention to one's duty. Although a board need not make rules governing the general conduct of students outside of the school, it may use its judgment in inflicting punishment within reason for an infraction of this unwritten code of behavior.

Conduct of Pupils Outside of School.—In an early Missouri case a pupil was suspended from school because he violated a rule against attending social parties during the school year. The court ruled that, though the board did not have authority to make rules governing pupils after schools hours, the board was not liable for damages in suspending the pupil so long as it acted without malice, oppression, and wilfulness.

The directors of a school district are invested with the power and authority to make and execute all needful rules and regulations for the government, management and control of such school children as they may think proper, not inconsistent with the laws of the land. Under the power thus conferred, the directors are not authorized to prescribe a rule which undertakes to regulate the conduct of the children within the district, who have a right to attend the school, after they are dismissed from it and remitted to the custody and care of the parent or guardian. They have the unquestioned right to make needful rules for the control of the pupils while at school, and under the charge of the person or persons who teach it, and it would be the duty of the teacher to enforce such rules when made.[1]

On the other hand the Supreme Court of Iowa, in trying the case of a pupil who was suspended for violation of an attendance rule, put a broad interpretation on the board's powers of control over pupils outside of school:

Any rule of the school, not subversive of the rights of the children or parents, or in conflict with humanity and the precepts of divine law, which tends to advance the object of the law in establishing public schools, must be considered reasonable and proper. If the effects of acts done out of school-houses reach within the school-room during school hours and are detrimental to good order and the best interest of the pupils, it is evident that such acts may be forbidden. . . . The view that acts, to be within the authority of the school board and teachers for discipline and correction, must be done within school hours, is narrow, and without regard to the spirit of the law and the best interest of our common schools.[2]

RIGHT TO PUNISH

Reasonableness of Rule to Punish.—A thoroughly established rule in the government of a school is that a board of school control is invested with such power as may be delegated to a teacher to punish a pupil for a violation of good order and necessary discipline; but the nature and extent of the punishment which may be thus inflicted have always depended upon the circumstances of each individual case. Cruel or excessive punishment is construed to be unreasonable and improper, but any reasonable rule adopted and enforced without malice is within the discretionary power of the teacher or superintendent of a school.[3]

Right of Teacher to Exact Obedience.—A school board has the discretionary privilege to allow a teacher the right to exact from the pupils obedience to his lawful and reasonable demands and rules, and to punish for disobedience, with kindness, prudence,

[1] Dritt v. Snodgrass, 66 Mo. 286, 296-297 (1877); Hodgkins v. Rockport, 105 Mass. 475 (1870); State *ex. rel.* Crain v. Hamilton, 42 Mo. App. 24 (1890).

[2] Burdick v. Babcock, 31 Iowa 562, 565-567 (1871).

[3] Fertich v. Michener, 111 Ind. 472, 11 N. E. 605 (1887).

and propriety. Where in such a case the punishment was not administered with unreasonable severity, an Indiana court held that a proceeding for assault and battery would not be maintained against a teacher.[4]

A Court of Appeals in Texas, May 25, 1887, stated a decision as follows:

> Our law wisely provides that the exercise of moderate restraint or correction by a teacher over a scholar is legal. . . . It is not shown by the evidence that the correction administered by the teacher to the pupil in this instance was immoderate. . . . That the punishment was inflicted for an infraction of a rule of the school, which infraction was committed away from the school-house, and not during the school-hours, did not deprive the teacher of the legal right to punish the pupil for such infraction.[5]

There is, however, a growing sentiment in America against corporal punishment in school.

Expelling a Pupil.—The power of decision of a school board, in so far as it relates to the rights of a pupil, is broad. Whether certain acts of disorder so seriously interfere with the school that one who persists in them should be suspended or expelled is a question for the school authorities alone; and usually their discretionary ruling will not be reviewable by a jury.[6] Likewise, the question of the guilt or innocence of a pupil expelled in accordance with rules established by the board usually cannot be reviewed by courts, unless it appears that the pupil was expelled arbitrarily or maliciously. Conclusions of several jurisdictions are that those in charge of schools have a right to formulate such necessary rules as in their judgment will promote the public good; and if such rules are violated by any pupil, the right to expel him exists and may be exercised by the proper authorities.[7]

Unnecessary Regulations.—While boards of school control have broad discretion in formulating rules and regulations for

[4] Danenhoffer v. State, 69 Ind. 295 (1879).

[5] Hutton v. State, 23 Tex. App. 386, 5 S. W. 122, 123 (1887).

[6] Cross v. Board of Trustees of Walton Graded Common School, 129 Ky. 35, 110 S. W. 346 (1908); Morrison v. City of Lawrence, 186 Mass. 456, 72 N. E. 91 (1904); Watson v. City of Cambridge, 157 Mass. 561, 32 N. E. 864 (1893); State *ex rel.* Crain v. Hamilton, 42 Mo. App. 24 (1890); Bozeman v. Morrow, 34 S. W. 2d 654 (Tex. Civ. App. 1931); City of Dallas v. Mosely, 286 S. W. 497 (Tex. Civ. App. 1926); City of New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S. W. 303 (1918); Guernsey v. Pitkin, 32 Vt. 224 (1859).

[7] Pugsley v. Sillmeyer, 158 Ark. 247, 250 S. W. 538 (1923); Cross v. Board of Trustees of Walton Graded Common School, 129 Ky. 35, 110 S. W. 346 (1908); Board of Education of Covington v. Booth, 110 Ky. 807, 62 S. W. 872 (1901); Morrison v. City of Lawrence, 186 Mass. 456, 72 N. E. 91 (1904); Brown v. Board of Education of Cleveland, 8 O. S. & C. P. Dec. 378, 6 Ohio N. P. 411 (1899).

the discipline of the school, the courts will not uphold regulations that are not necessary for the good government, good order, and efficiency of the school; nor will a court countenance any rule or regulation that does not have for its object the instruction of the pupil. The ruling of a court in Wisconsin was:

> School boards and boards of education have important duties to discharge, and we have no disposition . . . to circumscribe their powers in too narrow a compass. The statute clothes them with power to make all needful rules for the government of the schools established within their respective jurisdiction, and to suspend any pupil from the privileges of the school for non-compliance with the rules established by them, or by the teacher with their consent . . . yet it cannot fairly be claimed that the boards are uncontrolled in the exercise of their discretion and judgment upon the subject. The rules and regulations made must be reasonable and proper, or, in the language of the statute, *"needful,"* for the government, good order, and efficiency of the schools—such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare. But the rules and regulations must relate to these objects. The boards are not at liberty to adopt rules relating to other subjects according to their humor or fancy. . . .[8]

SUMMARY

1. A board is invested with broad discretionary powers in the formulation of rules and regulations for the discipline of a school.
2. In regard to general misconduct of pupils, a board has a discretionary right to make and enforce any rules necessary to maintain discipline.
3. Not only does a board have the right to make rules and regulations concerning pupils during school hours; but courts have held that a board may use its discretionary authority to control the conduct of pupils outside of school, if as a result of that conduct the inner workings of the school should be affected.
4. Provided punishment is not of such a nature and extent as to be wilful or malicious, school boards have a right to enforce the rules of a school by punishing a pupil who violates them.
5. A board may use its discretion in delegating such authority to a teacher as will enable him to manage and control the pupils.
6. Power to suspend or to expel a pupil for just cause lies within the discretion of school boards.
7. All rules and regulations regarding pupils must be necessary for the good government, good order, and efficiency of the school.

[8] State *ex rel.* Bowe v. Board of Education, 63 Wis. 234, 23 N. E. 102, 104 (1885).

CHAPTER XV

Powers of Boards of School Control in Regard to Suspension and Expulsion of Pupils

POWER TO SUSPEND OR EXPEL PUPILS

A BOARD of school control is vested with powers which will enable it to demand good discipline whether the infraction is committed within the school or, if committed out of school, is of such a nature that it will cause a bad influence within the school. Rules and regulations must always be just and reasonable, but may be severe enough to exact reasonable compliance from the student body. Within this discretionary power of the board of school control to demand obedience, a board may go to the extent of suspending or expelling a pupil if more moderate means will not suffice to induce sufficient co-operation.[1]

IRREGULAR ATTENDANCE

Rules for Attendance.—A school board may formulate such rules of attendance as will cause a pupil to attend school regularly and promptly. It is generally conceded that a student who persists in being absent or tardy will not only get behind in his own studies, but will so annoy others as to interfere with instruction. Therefore, an Iowa court has held:

> The rule in question as we have shown operates directly upon the order of the school—upon the pupils when assembled for instruction. It promotes efficiency to the school, and secures the progress of the pupils in their studies. It is, therefore, a rule for the *government of the school,* and must be regarded as proper and reasonable, and within the authority of the school officers to prescribe and enforce.[2]

[1] Fertich v. Michener, 111 Ind. 472, 11 N. E. 605 (1887); Cross v. Board of Trustees of Walton Graded Common School, 129 Ky. 35, 110 S. W. 346 (1908); Commonwealth v. Johnson, 309 Mass. 476, 35 N. E. 2d 801 (1941); Morrison v. City of Lawrence, 186 Mass. 456, 72 N. E. 91 (1904); Watson v. City of Cambridge, 157 Mass. 561, 32 N. E. 864 (1893); State *ex rel.* Crain v. Hamilton, 42 Mo. App. 24 (1890); City of Dallas v. Mosely, 286 S. W. 497 (Tex. Civ. App. 1926); City of New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S. W. 303 (1918).

[2] Burdick v. Babcock, 31 Iowa 562, 567-568 (1871); King v. Jefferson City School Board, 71 Mo. 628 (1880).

Absence from School for Religious Services.—In some jurisdictions parents may demand that their children be allowed to leave school to attend some form of church service; but if the school has a rule to the contrary and refuses to concur in the wishes of the parents concerning the children, the school officials are within their discretionary rights to suspend or expel the pupils if they absent themselves from school to attend religious services at the wishes of their parents.[3] Absences from school for other causes would also constitute liability for expulsion, at the discretion of the board, unless they should be those for which excuse is granted.

Tardiness as Basis for Expulsion.—If a pupil persists in being tardy to school without reasonable excuse, his behavior is often considered in the same light as that of the pupil who is absent a number of times, and several courts have held that the board is invested with a right to suspend or expel him.[4]

BAD CONDUCT AT SCHOOL

Defamatory or Satirical Writing.—In 1908 the Supreme Court of Wisconsin held that a student who writes anything reflecting upon the rules of the school, or who writes something defamatory to the character of some school official, may be suspended or expelled at the discretion of the board.[5]

Criticism of Board of Education.—A California Court of Appeals in 1915 stated that where a high-school student in a students' meeting, or in any other kind of meeting in connection with the school, criticizes the board of education, it is within the power of the board to punish the pupil for insubordination by expulsion.[6] Courts have held that those in charge of schools have a right to formulate such necessary rules as in their judgment will best promote the public good; and if such rules are violated by any pupil, the right to expel such pupil exists and may be exercised by the proper school authorities; and the question as to the guilt or innocence of the accused cannot be reviewed by the courts unless it appears that such pupil was expelled arbitrarily or maliciously.[7]

[3] Ferriter v. Tyler, 48 Vt. 444 (1876).

[4] Thompson v. Beaver, 63 Ill. 353 (1872); Burdick v. Babcock, 31 Iowa 562 (1871); Hodgkins v. Rockport, 105 Mass. 475 (1870); Spiller v. Inhabitants of Woburn, 12 Allen 127 (Mass. 1866); Sherman v. Inhabitants of Charlestown, 8 Cush. 160 (Mass. 1851); Roberts v. City of Boston, 5 Cush. 198 (Mass. 1849); People *ex rel.* Gray v. Medical Society, 24 Barb. Ch. 570 (N. Y. 1857); State *ex rel.* Burpee v. Burton, 45 Wis. 150 (1878).

[5] State *ex rel.* Dresser v. District Board of School Dist. No. 1, 135 Wis. 619, 116 N. W. 232 (1908).

[6] Wooster v. Sunderland, 27 Cal. App. 51, 148 Pac. 959 (1915).

[7] Christian v. Jones, 211 Ala. 161, 100 So. 99 (1924); Board of Education of Covington v. Booth, 110 Ky. 807, 62 S. W. 872 (1901).

Leaving School Grounds.—It is entirely within the discretionary power of the board to state whether a child shall or shall not leave the school grounds during the school day. If any child does leave without permission, he may be expelled, and the court will uphold the expulsion.[8]

Detention after School Hours.—The detention of a pupil for a short time after school has been dismissed for the day, as a penalty for misconduct, is a recognized method of enforcing discipline and promoting the progress of the pupils in the common schools. Even though the detention be a mistake on the part of the instructor, it cannot be considered false imprisonment unless imposed from wanton, wilful, or malicious motives; an Indiana court held that such action is wholly within the discretion vested in the board of education. If after being told to remain after school, a pupil deliberately leaves, the board has power to expel him.[9]

Improper Signing of Report Cards.—In Nebraska a court decided that a board has been invested with discretionary power to rule that a child whose parent refuses to sign a report card may be sent away from school until the card is properly indorsed, at which time the pupil may return.[10]

Contempt of School.—When a serious infraction of rules has been committed by one pupil within the knowledge of another pupil, the latter may be suspended or expelled, at the discretion of the board, if he refuses to give the name of the miscreant to the proper authorities. In one case a pupil had written profane and obscene language on a school building; upon interrogation a pupil told the superintendent that he had been told by another pupil the name of the culprit but refused to provide his name, whereupon the superintendent expelled him. The ruling of the Illinois court was:

> The ordinary laws of decency and propriety in conduct and in speech can not be disregarded and when broken there must be prompt and effective punishment, otherwise the great objects of the school will fail of accomplishment. . . . It is the duty of all good citizens to uphold the officers of the law and when called upon by a grand jury every man may be required to state upon oath what he may know as to the perpetration of any crime or misdemeanor, though he is, of course, not bound to criminate himself.
>
> So here every pupil, when called upon by the superintendent or by the board, should, as a matter of duty and loyalty to what is essen-

[8] Christian v. Jones, 211 Ala. 161, 100 So. 99 (1924); Goodman v. School Dist. No 1, 32 F. 2d 586 (C. C. A. Colo. 1929); Bozeman v. Morrow, 34 S. W. 2d 654 (Tex. Civ. App. 1931); City of Dallas v. Mosely, 286 S. W. 497 (Tex. Civ. App. 1926).

[9] Fertich v. Michener, 111 Ind. 472, 11 N. E. 605 (1887).

[10] Bourne v. State *ex rel.* Taylor, 35 Neb. 1, 52 N. W. 710 (1892).

tial to the common welfare, freely state anything within his knowledge not self-criminating, that will assist in bringing the offender to justice and thereby tend to the repression of all such offences.

If he refuses to do this he is guilty of disobedience, for which reasonable punishment may be inflicted. By the provisions of the school law, . . . the board may suspend or expel a pupil for "gross disobedience or misconduct."[11]

Devices That Disturb.—A board of school control has power to forbid the wearing of any article of clothing, such as a certain type of shoes, or the use of any unnecessary mechanical device when such article or device disturbs the proper conduct of the school. For example, a board may adopt a rule against the wearing of metal plates on shoes if it appears that the use of such plates injures the floors of the school and causes noise and confusion in and about the school building so as to interfere with the conduct and discipline of the school. In several courts there have been rulings that a board may declare a pupil's refusal to comply with such a rule to be an act of insubordination and may either suspend or expel the pupil.[12]

GENERAL MISCONDUCT

Acts of Disorder.—Where a pupil persists in whispering, general disorder, laziness, slovenliness, being rude, acting discourteously to teachers and pupils, etc., a board is within its discretion to discipline him; and if he continues to misbehave, the board may exclude him from the school on the ground that a board has power to prevent any disturbances which will seriously interfere with the school program. In 1893 the Supreme Court of Massachusetts stated:

> Whether certain acts of disorder so seriously interfere with the school that one [who] persists in them, either voluntarily or by reason of imbecility, should not be permitted to continue in the school, is a question which the statute makes it their duty to answer: and if they [the members of the board] answer honestly, in an effort to do their duty, a jury composed of men of no special fitness to decide educational questions should not be permitted to say that their answer is wrong.[13]

Viciousness, Filth, and Contagious Diseases.—Pupils who are vicious in their conduct or filthy in their habits, and those who have infectious diseases may be excluded from school. The school

[11] Board of Education v. Helston, 32 Ill. App. 300, 305-306 (1889).

[12] Christian v. Jones, 211 Ala. 161, 100 So. 99 (1924); Wilson v. Board of Education, 137 Ill. App. 187 (1907), *aff'd*, 233 Ill. 464, 84 N. E. 697 (1908); Stromberg v. French, 60 N. D. 750, 236 N. W. 477 (1931).

[13] Watson v. City of Cambridge, 157 Mass. 561, 32 N. E. 864, 865 (1893); Hodgkins v. Rockport, 105 Mass. 475 (1870).

is a place to build character. When it fails to impress traits of character upon its pupils, it has ceased to perform its greatest mission. Therefore, those pupils who persist in destroying instead of building up morals may at the discretion of the board be excluded from school so that their influence will not affect other pupils while at school.[14]

DRESS

Personal Appearance.—Several court rulings have stated that a school board is invested with sufficient discretion to make rules and regulations concerning dress and personal appearance in general of the pupils and that it may go to the extent of expulsion in order to enforce them if drastic measures become necessary. Courts have even held that if a board elects to do so it may require high-school boys and girls to wear uniforms while at school, it may debar girls from the wearing of transparent hosiery, low-necked dresses, or any clothing tending toward immodesty in dress, or it may forbid the use of cosmetics. Needless to say, requirements of this character would not be popular with pupils in some communities.

In a case where a rule forbade the use of rouge or other cosmetics, in 1923 the Supreme Court of Arkansas ruled:

> In the discharge of the duty here imposed upon us it is proper for us to consider whether the rule involves any element of oppression or humiliation to the pupil, and what consumption of time or expenditure of money is required to comply with it. It does not appear unreasonable in any of these respects. Upon the contrary, we have a rule which imposes no affirmative duty, and no showing was made, or attempted, that the talcum powder possessed any medicinal properties, or was used otherwise than as a cosmetic.
>
> We are unwilling to say, as a matter of law, that a local condition might not exist which would make a rule of this character desirable in aid of the discipline of the school, and we therefore decline to annul it, for we will not annul a rule of this kind unless a valid reason for doing so is made to appear; whereas, to uphold it, we are not required to find a valid reason for its promulgation.[15]

HEALTH REGULATIONS

Vaccination as Requisite to School Entrance.—The law giving the board of school control the power of making all needful rules

[14] Tape v. Hurley, 66 Cal. 473, 6 Pac. 129 (1885); Board of Education v. Helston, 32 Ill. App. 300 (1889); Spear v. Cummings, 23 Pick. 224 (Mass. 1839).

[15] Pugsley v. Sellmeyer, 158 Ark. 247, 250 S. W. 538, 539-540 (1923); State *ex rel.* Black v. Board of Directors, 154 Ark. 176, 242 S. W. 545 (1922); Maddox v. Neal, 45 Ark. 121 (1885); Jones v. Day, 127 Miss. 136, 89 So. 906 (1921).

and regulations for the government of the schools is usually held to include power to make such health rules as are necessary for the welfare of the student body. While courts disagree as to the authority of a school board to require all children to be vaccinated before they may enter school, it is usually held that, even in the absence of specific statutory authority, school boards may make rules requiring vaccination or temporary exclusion from school if a smallpox epidemic is present or threatening.[16]

One board became alarmed because of a reported case of smallpox near by and passed a rule excluding all pupils who would not undergo a vaccination against the disease. The Supreme Court of Pennsylvania held that the rule was reasonable and declared that there was a vast difference between ruling that all pupils must be vaccinated before they should enter school and a temporary exclusion from school when an epidemic was threatening.

> The school boards do not claim that they can compel the plaintiff to vaccinate his son. They claim only the right to exclude from schools those who do not comply with such regulations of the city and the board of directors as have been thought necessary to preserve the public health . . . they may exclude such children as decline to comply with requirements looking to prevention of the spread of contagion, provided these requirements are not positively unreasonable in their character.[17]

Where there is no smallpox in or near a school and no epidemic is apparent, in some jurisdictions a board of school control is without authority to make a rule that all pupils must be vaccinated, if there is no statutory provision permitting that discretion, even though the board of health may countenance such a rule. In 1901 the Supreme Court of Michigan ruled:

> The board of education is a creature of the statute. It possesses only such powers as the statute gives it. The legislature has said who may and should attend the public schools . . . the legislature has not undertaken to give them [the school boards] the power, when no epidemic of contagious disease exists or is imminent in the district, to pass a general, continuing rule which would have the effect of a general law excluding all pupils who will not submit to vaccination.[18]

[16] Hagler v. Larner, 284 Ill. 547, 120 N. E. 575 (1918); State *ex rel.* Freeman v. Zimmerman, 86 Minn. 358, 90 N. W. 783 (1902); State *ex rel.* O'Bannon v. Cole, 220 Mo. 697, 119 S. W. 424 (1909); *In re* Rebenack, 62 Mo. App. 8 (1895); Duffield v. School Dist. of Williamsport, 162 Pa. 476, 29 Atl. 742 (1894); Glover v. Board of Education of Lead, 14 S. D. 139, 84 N. W. 761 (1900); Staffel v. San Antonio School Board of Education, 201 S. W. 413 (Tex. Civ. App. 1918); Zucht v. San Antonio School Board, 170 S. W. 840 (Tex. Civ. App. 1914); State *ex rel.* Cox v. Board of Education of Salt Lake City, 21 Utah 401, 60 Pac. 1013 (1900).

[17] Duffield v. School Dist. of Williamsport, 162 Pa. 476, 29 Atl. 742 (1894).

[18] Mathews v. Board of Education, 127 Mich. 530, 86 N. W. 1036, 1040

In some states, however, there is specific provision either by statute or district charter that a school board may require vaccination regardless of the existence or threat of smallpox. The Supreme Court of Ohio, May 7, 1907, held that since statute gives specific authority to the board to pass such rules on vaccination as they see fit, their action is entirely discretionary and not subject to judicial review or interference.[19]

Other Diseases.—When a board of health is invested with the power to adopt and promulgate rules for the control and prevention of infectious, contagious, and communicable diseases, the school board is invested with discretionary right to demand that this power be executed and that the pupils abide by its decision. Accordingly, if a pupil refuses to abide by the decision of the board, he may not be allowed to continue in school until he shall abide by such decision.[20]

RELIGIOUS EXERCISES

Mandatory Religious Exercises.—Courts have held that when a state permits or requires the reading of any part of the Bible and offering prayer in school, proper conduct during such reading and prayer is reasonable and necessary to order. In 1894 the Supreme Court of Pennsylvania ruled that if it is the custom of a school to have religious exercises, when the parents do not object to their children's taking part in the exercises, a board is within its discretionary rights if it elects to suspend or to expel a pupil who refuses to take part in the religious exercises.[21]

In a Massachusetts case where a board required a portion of the Bible to be read each day without comment and allowed any pupil to be excused upon request from his parents, the court upheld the rule of the board as not being contrary to that part of the Constitution providing freedom of religious worship. The court ruled in 1859 that the constitutional provision

> was intended to prevent persecution by punishing for religious opinions. The Bible has long been in our common schools. It was placed there by our fathers, not for the purpose of teaching sectarian religion, but a knowledge of God and of his will, whose practice is religion. . . .
>
> But, in doing this, no scholar is requested to believe it, none to receive it as the only true version of the laws of God. The teacher

(1901); People *ex rel.* Labaugh v. Board of Education, 122 Ill. 572, 52 N. E. 850 (1890); Potts v. Breen, 167 Ill. 67, 47 N. E. 81 (1897); State *ex rel.* Adams v. Burdge, 95 Wis. 390, 70 N. W. 347 (1897).

[19] Bissell v. Davidson, 65 Conn. 183, 32 Atl. 348 (1894); State *ex rel.* Milhoof v. Board of Education, 76 Ohio St. 297, 81 N. E. 297 (1907).

[20] Pfeiffer v. Board of Education of Detroit, 118 Mich. 560, 77 N. W. 250 (1898).

[21] Duffield v. School Dist. of Williamsport, 162 Pa. 476, 29 Atl. 742 (1894).

enters into no argument to prove its correctness, and gives no instructions in theology from it. To read the Bible in school for these and like purposes, or to require it to be read without sectarian explanations, is no interference with religious liberty.[22]

In a similar situation which came under the jurisdiction of the Supreme Court of Kansas in 1904, the ruling was:

. . . the Legislature . . . in positive terms prohibits the teaching of sectarian or religious doctrine. However, there is nothing in the Constitution or statute which can be construed as an intention to exclude the Bible from the public schools. . . . It could not, therefore, have been the intention of the framers of our Constitution to impose the duty upon the Legislature of establishing a system of common schools where morals were to be inculcated and exclude therefrom the lives of those persons who possessed the highest moral attainments. . . . the exercises of which plaintiff complained were not a form of religious worship, or the teaching of sectarian or religious doctrine. There was not the slightest effort on the part of the teacher to inculcate religious dogma. She repeated the Lord's Prayer and the Twenty-Third Psalm without response, comment, or remark. The pupils who desired gave their attention and took part, those who did not were at liberty to follow the wandering of their own imagination.[23]

Religious Exercises as Discriminatory.—Some jurisdictions have held that the reading of the Bible without comment is prohibited by the Constitution even though pupils who request to absent themselves are permitted to do so. In reaching the above conclusion the Supreme Court of Illinois in 1910 stated that if parents may request that their children be excused from listening to the reading of the Bible, then such exercise must surely constitute an element of religious worship.

The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him and his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is

[22] Commonwealth *ex rel.* Wall v. Cooke, 7 AM. L. REG. 417, 423 (Mass. 1859); Allen v. Ingalls, 182 Ark. 991, 33 S. W. 2d 1099 (1930); State v. Martin, 134 Ark. 420, 204 S. W. 622 (1918); Auten v. Board of Directors, 83 Ark. 431, 104 S. W. 130 (1907); McCormick v. Burt, 95 Ill. 263 (1880); Morre v. Monroe, 64 Iowa 367, 20 N. W. 475 (1884); Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S. W. 792 (1905); Donahoe v. Richards, 38 Me. 379 (1854); Nessle v. Hum, 2 O. S. & C. P. Dec. 60, 1 Ohio N. P. 140 (1894); Stevenson v. Hanyon, 7 Pa. Dist. 585 (1898); Church v. Bullock, 104 Tex. 1, 109 S. W. 115 (1908).

[23] Billard v. Board of Education, 69 Kan. 53, 76 Pac. 422 (1904).

such that certain pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the Constitution.[24]

In addition, a Louisiana court pointed out that the Old and New Testaments are contrary to the Jewish religion, and a reading of them is discriminatory against the Jew.[25]

Right of Board to Prohibit the Use of the Bible.—Although courts are divided in their opinion concerning the use of the Bible in schools, all of them appear to be of one accord in declaring that a school board has a discretionary right to prohibit the use of the Bible in any way in the public schools in states that do not require by statute the use of the Bible. The holding of the courts seems to be that when the Constitution of the United States and the constitution of the individual states do not require any reading of the Bible in public schools, the board has the power to prohibit it.[26]

Released-Time Religious Instruction.—In the recent Supreme Court decision in the *McCollum v. Board of Education of School Dist. No. 71, Champaign County, Illinois* case it was declared unconstitutional for a public school to release pupils from regular school curriculum for the attendance of sectarian religious exercises conducted with the active co-operation of the school. Religious exercises held at the end of the school day or outside of school hours in the school building, however, are not affected by this decision. Nor are typical opening exercises such as the reading of the Bible, repeating the Lord's Prayer, or reciting of psalms.[27]

CARELESS ACT

Except where there is specific statute providing for the punishment of a pupil who destroys school property, as in North Carolina, a board of school control is not usually justified in using its discretionary powers to suspend or to expel a child from the public schools for a careless act, no matter how negligent, if the act was not wilful or malicious. For example, a Michigan court in 1889 held that where a pane of glass is broken or other property de-

[24] People *ex. rel.* Ring v. Board of Education of Dist. No. 24, 245 Ill. 334, 92 N. E. 251, 256 (1910).

[25] Herold v. Parish Board of School Directors, 136 La. 1034, 68 So. 116 (1915).

[26] Board of Education of New Antioch Special School Dist. v. Paul, 7 Ohio N. P. 58 (1900); Board of Education of Cincinnati v. Minor, 23 Ohio St. 211 (1872).

[27] People of Illinois *ex rel.* McCollum v. Board of Education of School Dist. No. 71, Champaign County, Illinois, 68 S. Ct. 461 (1948).

faced, since there is no gross misconduct or persistent disobedience on the part of the pupil, no punishment may be inflicted.

It is not necessary that a pupil shall be guilty of a criminal act before he can be suspended or expelled from school. But, before he can be thus dealt with, he must be guilty of some wilful or malicious act of detriment to the school, and the misconduct must be gross,—something more than a petty or trivial offense against the rules,—or he must be persistent in his disobedience of the proper and reasonable rules and regulations of the school. . . . It is not desirable nor permissible that a child may be excluded from the common schools because, by a careless or negligent act, without malice or willfulness, it has injured or damaged school property to such an extent that it is beyond its power, or that of its parent or guardian, to make compensation for it. This would be the effect of the rule, if carried out in many cases.[28]

An example of such a case is given wherein a boy accidentally batted a ball through a school window. He had no means to pay. Since his parents would not provide him with the money, he was expelled. Certainly he was not guilty of serious offense or disorder, as the act was purely unintentional. An Iowa court in 1880 reasoned that the pupil was being punished for failure to pay for the damage, and not for committing the deed. Therefore, the court decision stated that since the rule was not intended to secure good order but to enforce the payment of a sum of money for the property defaced or destroyed, the directors had no authority to promulgate such a rule.[29]

PARENTAL INTERFERENCE

Interference by Parents.—When there is no statutory provision against corporal punishment, and when in the opinion of the teacher there is misconduct on the part of a child so as to merit a whipping, and the parent refuses to allow the child to receive corporal punishment or to whip the child himself, the board of school control may exercise its discretionary powers and suspend or expel the child.[30]

Insulting Acts of Parents.—Unlawful acts committed by a parent against a school will cause the "sins of the parents to be visited upon the child" if the parent interrupts the exercise of the school or abuses a teacher. The child of such a parent may be suspended or expelled at the discretion of the board. The Georgia Supreme Court in 1897 said that a rule suspending pupils for

[28] Holman v. School Trustees of Avon, 77 Mich. 605, 43 N. W. 996, 997 (1889); State v. Vanderbilt, 116 Ind. 11, 18 N. E. 266 (1888).

[29] Perkins v. Board of Directors, 56 Iowa 476, 9 N. W. 356 (1880).

[30] Fessman v. Seeley, 30 S. W. 268 (Tex. Civ. App. 1895).

their parents' interference with the discipline of the school was reasonable and just as the only means of preventing a continuation of such interference, and that it was plainly the duty of the school board to protect the teachers and maintain the discipline of the school.[31]

Request for Hearing by Parents.—A pupil may be suspended or expelled at the discretion of a board for a gross misdemeanor or persistent disobedience, without notice to either the pupil or his parents. Nevertheless, there must be granted a hearing before the school board on the preferred charges before the permanent expulsion of the pupil is effected if the parent or guardian demands it, where there is no contrary statutory provision.[32]

Damage Suits by Parents.—While the discretionary power of a school board is broad, it does not have a right to abuse the power wrongfully to expel a child. Therefore a parent who is entitled to the benefits of a public school may maintain action against a teacher and a board of school control for damages when a child is wrongfully expelled from school.[33]

BAD CONDUCT AWAY FROM SCHOOL

It is usually understood that when a pupil is at school the school authorities have control over him; but that when he leaves school, or certainly when he arrives at his home, the school has no more to do with the pupil. In many places, however, schools have suspended or expelled pupils for acts committed away from school. The courts have held that a board of school control is invested with such discretion, but that a school board in making its rules has to consider whether the act is such as will have a direct tendency to influence the conduct of other pupils, to set at naught proper discipline, to impair the discipline of the teacher, or to bring school officials into ridicule or disrepute. In 1922 the Supreme Court of Missouri judged that a rule of the school board against pupils' belonging to Greek-letter societies was not reasonable, since

> no rule should be adopted which attempts to control the conduct of pupils out of school hours after they have reached their homes which does not clearly seek to regulate actions which, if permitted, will detrimentally interfere with the management and discipline of the school.[34]

[31] Board of Education v. Purse, 101 Ga. 422, 28 S. E. 896 (1896).

[32] Bishop v. Inhabitants of Rowley, 165 Mass. 460, 43 N. E. 191 (1896).

[33] Roe v. Deming, 21 Ohio St. 666 (1871); Van Camp v. Board of Education of Logan, 9 Ohio St. 407 (1859); Lane v. Baker, 12 Ohio 237 (1843); Williams v. Directors of School Dist. No. 6, Wright 578 (Ohio 1834).

[34] Wright v. Board of Education, 295 Mo. 466, 246 S. W. 43, 46 (1922).

Athletic Contests.—A school board may make rules to prohibit students from playing games under the auspices of the school at any time and at any place, whether it be on a school day, holiday, or Saturday. When enforcing this power, the board may, if it so elects, suspend or expel a pupil who participates. An Iowa court stated:

> The general character of the school and the conduct of its pupils, as affecting the efficiency of the work to be done in the school room and the discipline of the scholars, are matters to be taken into account by the school board, making rules for the government of the school. They have no concern, it is true, with the individual conduct of the pupils wholly outside of the school room and school grounds and while they are presumed to be under the control of their parents . . . ; but the conduct of pupils which directly relates to and affects the management of the school and its efficiency is within the proper regulation of the school authorities. . . . We have no doubt as to the power of the defendant board, in the exercise of its reasonable discretion as to the management of the high school, to determine that it was detrimental to the best interests of the school that pupils should be encouraged by their school associations to engage in games of football with teams of other high schools, and we think that their proper power . . . was not limited to the high school grounds, but extended to participation by the pupils in games as members of a team purporting to represent in any way the high school under the control of the defendant board. . . .[35]

IMMORALITY

Courts have held that a board of school control is invested with sufficient discretion to exclude from school any pupil who is known to be highly immoral and to have a bad influence upon the pupils of the school, even though all acts of immorality should be committed outside of school and off the school grounds, since such a pupil might become a great nuisance and a detriment to the welfare of the school.

Licentiousness.—A pupil who is known to be licentious or immoral in other ways may not be permitted to attend school, even though all acts of misconduct may be performed off the school grounds. Supreme Court decisions in Alabama and Massachusetts have held that a board has the right of discretion to prohibit pupils of licentious and grossly immoral character from attending school even though such pupils conduct themselves properly during school hours. The courts do not believe schools have been left by law without reasonable protection against a

[35] Kinzer v. Directors of Independent School Dist. of Marion, 129 Iowa 441, 105 N. W. 686, 688 (1906).

pupil whose presence is obnoxious and who has an immoral influence upon other students.[36]

Drunkenness and Disorderliness.—In 1909 the Arkansas Supreme Court ruled that when statutes authorize a school board to make such rules and regulations as will insure the proper discipline of a school, a board has discretion as to the kind of punishment that may be inflicted. Therefore when a pupil was suspended for drunkenness, even though the offense was not committed at school or on a school day, the court held that the board was acting within its powers, stating:

> Being drunk and disorderly in violation of the ordinance of the town as charged was sufficient cause for the punishment inflicted. . . . Wholesome discipline is absolutely essential to the success of any school. Large discretion is allowed the teacher and the board within the statute in determining what course is necessary for the good of the whole school.[37]

BEHAVIOR ON THE WAY TO AND FROM SCHOOL

It is universally understood in this country that a board of school control has a right to make such rules as it desires, within reason, to control the behavior of pupils on their way to and from school. This control is necessary because of the large number of pupils mingling together and the problems arising because of such conditions. Since there must be some central authority, courts have upheld the discretionary actions of the school board in dealing with the problems of student discipline from the time students leave home until they return.

Fighting and Profanity.—A board may suspend or expel a pupil for using profanity, for fighting, and for unnecessarily rough treatment of another pupil while on the way to or from school. His conduct is declared to be detrimental to the discipline of the student body and harmful in general. In passing judgment, a Missouri court said:

> It must be conceded without question that the rule, in so far as it forbade such acts on the part of the scholars while at school, was not only reasonable, but necessary to the orderly conduct of the school. But it may be insisted . . . that as soon as the scholars were dismissed from school by the teacher, his authority over them ceases, and that of the parent is resumed, and that, therefore, that portion of the rule which forbids such acts as are therein mentioned, while the scholars are on their way to their homes, is without sanction or

[36] Kenney v. Gurley, 208 Ala. 623, 95 So. 34 (1923); Sherman v. Inhabitants of Charlestown, 8 Cush. 160 (Mass. 1851).

[37] Douglas v. Campbell, 89 Ark. 254, 116 S. W. 211, 213 (1909).

authority. We are unwilling to go to this extent, believing it to be unsupported either by reason or weight of good authority.[38]

Mistreatment of Others upon Arrival Home.—The school authorities have discretionary power to suspend or expel a pupil who persists in mistreating others immediately after his arrival at home. On March 6, 1925, the Supreme Court of Errors of Connecticut held that the true test of the limit of school authority is not whether the pupil has returned to his home, nor the time or place of offense, but effects upon the morale and efficiency of the school, and that the proper correction is in the hands of the school officials.[39]

SALUTING THE FLAG

Courts have generally held that it is within constitutional bounds for a statute to require pupils to salute the American flag and to pledge allegiance to the United States of America.[40] However, on June 14, 1943, the Supreme Court held as unconstitutional a rule of a West Virginia school that pupils must salute the flag. In this case it was declared that children of Jehovah's Witnesses who violated their religious principles when saluting the American flag should not be expelled for their refusal to do so.[41]

SUMMARY

1. School boards are invested with power to make and enforce such rules as will insure the proper conduct of pupils and if necessary to suspend or expel pupils who violate reasonable rules.
2. A board may use its discretionary authority in suspending a pupil who persists in being absent from or tardy to school without proper permission or excuse.
3. When dealing with pupils who write or say anything derogatory about the school, a school official, or the board of school control, the board may employ wide discretion.
4. A board is held to be within its rightful discretion in expelling a pupil who leaves the school grounds without permission.
5. A pupil who leaves the school building after school when he has been told to report to a teacher for detention may be expelled at the discretion of the board.

[38] Deskins v. Gose, 85 Mo. 485, 488 (1885).

[39] O'Rourke v. Walker, 102 Conn. 130, 128 Atl. 25 (1925).

[40] Johnson v. Town of Deerfield, 25 F. Supp. 918 (D. C. Mass. 1939); Minersville School Dist. of Gobitis, 108 F. 2d 683 (C. C. A. 3rd 1939), *reversed*, 310 U. S. 586 (1940); Hering v. State Board of Education, 118 N. J. L. 566, 194 Atl. 177 (1937).

[41] Barnette v. West Virginia State Board of Education, 47 F. Supp. 25 (S. D. W. Va. 1942), *aff'd*, 319 U. S. 624 (1943).

6. When a parent refuses to sign the report card of a pupil, the board is within its rights to exclude the pupil from school until the card is properly signed.

7. One court held that a board is within its rights to suspend or expel a pupil who refuses to divulge to proper authorities the name of a miscreant in school.

8. When a rule exists prohibiting the wearing of any article or device which disturbs the proper conduct of the school, any pupil who persists in violating the rule may be expelled.

9. General and constant misbehavior of a pupil will constitute a sufficient cause for the board to suspend or expel him.

10. A pupil who persists in vicious or filthy physical or moral habits or one with a contagious disease may be excluded from school.

11. School boards may make such rules regarding the dress and personal appearance of students as will be for the better government of the school and if necessary enforce these rules by expulsion.

12. Although some courts have ruled that school boards do not have authority to require all children to be vaccinated before entering school, there is no restriction against a board's excluding from school any pupil who refuses to be vaccinated if an epidemic is present or threatening.

13. The school board has the right to demand that pupils abide by health rules adopted to prevent and control infectious, contagious, or communicable diseases.

14. The Pennsylvania Supreme Court in 1894 held that a board may use its discretion in the suspension or expulsion of a pupil who refuses to take part in nonsectarian religious exercises if his parents do not object to his taking part. Some courts, however, have held a reading of the Bible and a conducting of prayer to be unconstitutional and discriminatory to pupils of other religions regardless of whether pupils are permitted to excuse themselves or not. Almost all decisions accede the right of the board to prohibit the reading of the Bible provided the state constitution does not expressly provide for such readings. In the recent Supreme Court decision regarding religious classes in school it was declared unconstitutional for a public school to release pupils from regular school curriculum for the attendance at sectarian religious exercises conducted with the active co-operation of the school.

15. A board may not expel a pupil who has committed a careless act or who fails to pay for school property defaced because of a careless act.

16. A pupil whose parents refuse to punish or allow the school authorities to punish for misdemeanor may be expelled from school.

17. A board may dismiss any pupil whose parent or parents abuse the teachers or otherwise disturb the order of the school.

18. A board does not have discretionary power to expel a pupil permanently without granting a hearing to the parent or guardian of the pupil if such is desired.

19. Parents whose child has been wrongfully expelled may maintain a damage suit against a teacher or the school board.

20. Courts have held that boards of school control may use their discretionary power rather broadly in the control of pupils away from schools.

21. An Iowa court held that a board is invested with power to expel pupils who purport to represent the school in athletic contests, whether held on the school grounds or not, without permission.

22. A board is invested with broad discretion in dismissing licentious, drunken, or otherwise immoral pupils, even though all acts may be committed away from the school premises.

23. Courts have held that boards have discretionary power over the acts of pupils on the way to and from school.

24. On June 14, 1943, the Supreme Court held that children cannot be compelled to salute the American flag.

CHAPTER XVI

Powers of Boards of School Control in Regard to Curriculum

BRANCHES OF STUDY

WHERE there is not a statutory provision stating otherwise, a board of school control is vested with discretionary authority to decide what branches of study shall be taught in school and what textbooks shall be used. Even though this authority is allowed, an Illinois court said a board cannot decide what particular branches of those studies approved in the curriculum shall be pursued by each pupil.

> Under the power to prescribe necessary rules and regulations for the management and government of the school, they [school boards] may, undoubtedly, require classification of the pupils with respect to the branches of study they are respectively pursuing, and with respect to proficiency or degree of advancement in the same branches. . . .
>
> But no attempt has hitherto been made in this State to deny, by law, all control by the parent over the education of his child. . . . The policy of the school law is only to withdraw from the parent the right to select the branches to be studied by the child, to the extent that the exercise of that right would interfere with the system of instruction prescribed for the school, and its efficiency in imparting education to all entitled to share in its benefits. No particular branch of study is compulsory upon those who attend school, but schools are simply provided by the public in which prescribed branches are taught, which are free to all within the district between certain ages.[1]

LENGTH OF COURSE IN YEARS

Unless there is statutory provision which regulates the number of years of high-school work that shall be given in the districts of the state, a board of school control is invested with such discretion that it may be guided by conditions in the individual districts in determining the length of term or the number of years it will give to high-school work. If it so chooses, a school board may conduct a part-time high school of two- or three-year duration.[2]

[1] Trustees of Schools v. People *ex rel.* Van Allen, 87 Ill. 303, 307-308 (1877).

[2] Hartman v. Pesotum Community Consolidated School Dist. No. 52, 325 Ill. 268, 156 N. E. 283 (1927).

POWER TO SUPPLEMENT CURRICULUM

Even though statutes in many states set up the curriculum that shall be used, some leave discretion to a local board to supplement or augment that curriculum by teaching other and higher branches than those enumerated by law. However, it is purely optional with parents or guardians whether the children under their charge shall study such branches.[3]

Rights of Students in Choosing Courses.—If a school requires that a specific subject be pursued and a pupil refuses to comply with the rule or regulation, the board is not vested with proper discretion to punish the pupil. An Illinois court held that the pupil who attends a public school should be allowed to pursue any study of his choice within the school, so long as he is prepared through progression to be accessible to elect that subject. This ruling, however, does not militate against a prescribed course of study for graduation.[4]

Thrift Instruction.—A school board is empowered with discretionary authority to provide for thrift education within the prescribed curriculum, even though the regulation curriculum is set by statute. A board may without expense to the district or to the pupil authorize the installation in the schools of a noncompulsory, copyrighted system of thrift instruction which necessarily contemplates the deposit of the children's savings in some bank or banks selected without dictation by the board. For example, after a school board had adopted a system of thrift instruction without expense or dictation to the pupils of the school district, the record disclosed that the bank selected by the board to handle the funds was to pay the copyrighted authorities that promoted such thrift instruction for acting as depository. A taxpayer brought action, stating that he was in the banking business and that the carrying out of the thrift project created unfair competition in banking business. In its interpretation of the case the Iowa Supreme Court in 1906 stated:

> . . . we think it cannot be denied . . . that the instruction in thrift, as outlined and taught by the system adopted by the directors, in this case, comes properly and legally within the contemplation of a "course of study." The teaching of self-denial, and saving is by a definite and well-defined system or plan. It is, we think, clearly within the power of the board of directors of a school corporation to determine whether or not such a course of study shall be prescribed for the

[3] Rulison v. Post, 79 Ill. 567 (1875); Wasmund v. La Guardia, 287 N. Y. 417, 40 N. E. 2d 233 (1942), *reversing* 262 App. Div. 989, 30 N. Y. S. 2d 697 (1941).

[4] *Ibid.;* Morrow v. Wood, 35 Wis. 59 (1874).

public schools of the corporation and whether it shall be maintained or not. . . .

. . . The matter of the selection of a bank to act as a depository rested wholly between Thrift, Inc., and the bank with whom it could make a contract to act as depository and to furnish the necessary supplies for the carrying out of the system. The school corporation had nothing whatever to do with this contract. It was not a party to it in any way.[5]

SCHOLARSHIPS

Where a competitive examination is given for a scholarship, a board of school control has discretion in the making and grading of papers; but when the grades have been set, the remainder is a matter of clerical work only, and the board has no right to make awards to any other but the student making the highest grade or the students making the highest grades, if more than one scholarship is provided.[6]

SUMMARY

1. Where there is no statutory regulation which prescribes a curriculum, a board of school control has a wide discretion in deciding what branches of study shall be taught in a school and what textbooks shall be used, but it may not force a student to follow a prescribed course of study.

2. Unless there is statutory provision determining the number of years of high-school work that shall be given, a board may determine this question as it sees fit.

3. Even though a curriculum is determined by statute, some states permit school boards to supplement or augment that curriculum.

4. Pupils must be allowed to study whatever courses they choose, but the school board may set up requirements for graduation.

5. A school board is invested with sufficient discretionary power to provide for thrift education within the prescribed curriculum.

6. When a scholarship is awarded on the basis of scholastic standing alone, the student or students with the highest scores must arbitrarily be chosen.

[5] Security Nat. Bank of Mason City v. Bagley, 202 Iowa 701, 210 N. W. 947, 949-950 (1926).

[6] Hobbs v. Hodges, 5 A. 2d 842 (Md. 1939).

CHAPTER XVII

Powers of Boards of School Control in Regard to Textbooks

SELECTION OF BOOKS

Wide Discretion of Local Board.—In states where the selection of textbooks is left to the local boards of school control, the board has a wide discretion as to what kinds of books it will select and for how long a time it will use those selected.

Selection of High-School Books.—Some states have elementary schoolbooks adopted by statute, but leave the selection of high-school texts to the discretion of local boards of school control.

Limitation of Powers by Statute.—After a state agency has approved and adopted a list of textbooks, a local school board has no discretion in a further choice except to supplement those textbooks adopted. The local board must abide by the decision of the state authority unless the school district which the board of school control represents has been definitely exempted from the terms of the law. Where a statute empowers a textbook commission of a state to select and to adopt a uniform series of school textbooks for use in public schools in certain named branches and to fix the maximal price for which books may be sold to pupils, no school board has the discretion to use any other books than those adopted.

Wide Selection Permissible.—Boards of school control in California are invested with such a broad discretionary power in the selection of textbooks that they may purchase books outright. Textbooks adopted need not necessarily be printed in the state printing office. In 1932 the decision of the California Supreme Court was that a board is free to select the best books without regard to where they may be published.

As the Constitution of the state clothes the state board of education with the power to provide the necessary text-books for the elementary schools of the state and gives to said board the authority to either compile such text-books or to have them printed and published, or to purchase them outright in their printed and published state. . . . It was the duty of the state board of education . . . to provide for

the use of the schools of the state the series of books which in the judgment of its members would be most suitable for that purpose.[1]

CONTRACTS WITH BOOKSELLERS

A school board has no discretionary power to contract with a bookseller and pay him out of the contingent fund for handling schoolbooks if the district does not buy the books for resale but simply arranges with the publishers to place the books with a dealer to be sold by him at a stated price. In Iowa a taxpayer maintained an action to restrain any payment to the bookseller under a contract of such a nature.[2]

SALE OF TEXTBOOKS

Sale of Textbooks in School.—Ordinarily no authority is conferred upon a board of school control to sell textbooks at a profit. The Supreme Court of Wisconsin in 1914 ruled that a board of education cannot grant such authority or make any rule or regulation which would permit such sale, even if the profit made from the sale of books were used to benefit the school and the pupils. Courts in general do not sustain the actions of any person who sells books for private gain on public property without paying adequately for the use of the facilities provided. In sustaining this position the Wisconsin court said:

> The facts alleged in the complaint present a case wherein the defendants are charged with conducting "regular stores in the high school building under their charge and control, wherein they have sold drawing instruments, schoolbooks, stationery and blanks for a profit above the cost of such articles," and that they so use the buildings without paying any compensation therefor. . . . We think that school boards have not been granted authority to permit school buildings to be devoted to uses other than to school purposes, aside from those uses expressly enumerated in the statutes.[3]

Book Sales without Profit.—To engage in the sale of textbooks is declared to be assuming or taking on the character of a commercial or trading corporation by some courts. Therefore the Supreme Court of Michigan ruled in 1913 that school boards cannot buy and sell books even at cost.[4] An Iowa court, however, held that according to Iowa statutes a board may sell textbooks to pupils at cost and turn the proceeds into the contingent fund without abusing its discretionary privilege.[5]

[1] Smith v. State Board of Control, 215 Cal. 421, 10 P. 2d 736, 741 (1932).
[2] Ries v. Hemmer, 127 Iowa 408, 103 N. W. 346 (1905).
[3] Tyre v. Krug, 159 Wis. 39, 149 N. W. 718, 719-720 (1914).
[4] Kuhn *ex rel.* Sheehan v. Board of Education, 175 Mich. 438, 141 N. W. 574 (1913).
[5] Ries v. Hemmer, 127 Iowa 408, 103 N. W. 346 (1905).

RENTAL OF TEXTBOOKS

Fees for the Use of Textbooks.—Where there is no statutory provision to the contrary, a board of school control may use its discretion as to whether it will rent textbooks to pupils at a nominal price. The Supreme Court of Georgia, however, decreed in 1904 that if a pupil had textbooks, he may not be charged a rental fee; such a rule is unreasonable and beyond the discretionary power of the board. The court held that a board may in its discretion offer books for rental, but cannot compel the pupils to rent books if they wish to buy books at some retail place or otherwise obtain them.[6]

FREE TEXTBOOKS

Legal Provision.—A board of school control has no inherent discretionary power to provide free textbooks to pupils. Where a board of school control wishes to exercise its discretion in the provision of free textbooks for pupils, it must first see if it is endowed with such power either by constitution or statute. Only through some specific authority granted to a school district or to a school board can the use of free textbooks be justified legally. When a board is authorized to use its discretion to permit the free use of books, however, a court will sustain the power invested in the board. Courts have said that to use the money raised by taxation for school purposes in purchasing books for individual pupils is plainly not an incidental power of the school board aside from express authority. The maintenance of the schools does not necessarily involve the furnishing of schoolbooks to students; nor can it be implied that from the authority to maintain schools a school board may compel taxpayers in general, regardless of whether they have children attending the schools, to pay taxes for the purpose, not only of supporting schools, but of enabling the children who attend them to have books without cost.[7]

Right to Impose Tax for Free Textbooks.—The California Supreme Court in 1920 ruled that where a board of school control is permitted by law to provide free textbooks to pupils, the board has a discretionary right to impose a tax to pay for the necessary books, whether they are used by elementary or high-school pupils.[8] In 1913 the Michigan Supreme Court held that the legislature reserves the right to impose burdens which must be met by local taxation, because public schools are a part of the state public-school

[6] Mathis v. Gordy, 119 Ga. 817, 47 S. E. 171 (1904).

[7] Harris v. Kill, 108 Ill. App. 305 (1903); Honey Creek Township v. Barnes, 119 Ind. 213, 21 N. E. 747 (1889); Ries v. Hemmer, 127 Iowa 408, 103 N. W. 346 (1905); Board of Education of Detroit v. Common Council of Detroit, 80 Mich. 584, 45 N. W. 585 (1890).

[8] Macmillan Co. v. Clarke, 184 Cal. 491, 194 Pac. 1030 (1921).

system. Therefore, specific authority to provide free textbooks to pupils should first be conferred by the legislature of any state.[9]

LIBRARY BOOKS

Wide Discretion in Selection.—Libraries are held to be a part of public education and are controlled in accordance with the policies of education. There is probably a wider discretion allowed school board members in the selection of books for library use, however, than in any other integral part of the educational program. In some states the school board may select any books it thinks to be for the best interest of the school; in other states there are found multiple lists of books from which to choose, but in all states sufficient breadth of discretion is permitted not to cramp the selection of a creditable list of books for educational advancement.[10]

Dictionaries and Reference Books.—A board may use its discretion in the purchase of dictionaries and reference books for pupils. Several Indiana courts have held that dictionaries are not the individual property of pupils to be used by each individual scholar, but are used by all pupils, and should therefore be paid for as property of a school unit.[11]

Reading-Circle Books and Supplementary Readers.—Three Indiana courts have held that a board does not have any discretion in the purchase of reading-circle books or supplementary readers, since, even though such books are useful to pupils, they are declared not to be a part of the public education system. The courts have said that reading-circle books for the individual use of pupils have no place and connection with the schools within the meaning of the provision of the law. So to hold would be to confer upon a board of school control unlimited power and authority in such matters, and this would be a dangerous rule.[12]

FREE BOOKS FOR THE POOR

In Indiana, where there is a statute permitting a school board to employ its discretion in the provision of the free use of books to indigent children, the board must furnish temporary aid and file with the auditor a list of the names of the students so cared

[9] Kuhn *ex rel.* Sheehan v. Board of Education, 175 Mich. 438, 141 N. W. 574 (1913).

[10] Macmillan Co. v. Clarke, 184 Cal. 491, 194 Pac. 1030 (1921).

[11] First Nat. Bank v. Adams School Township, 17 Ind. App. 375, 46 N. E. 832 (1897); Honey Creek School Township v. Barnes, 119 Ind. 213, 21 N. E. 747 (1889); School Township v. Hadley, 59 Ind. 534 (1877).

[12] First Nat. Bank v. Adams School Township, 17 Ind. App. 375, 46 N. E. 832 (1897); First Nat. Bank of Elkhart v. Osborne, 18 Ind. App. 442, 48 N. E. 256 (1897); Honey Creek School Township v. Barnes, 119 Ind. 213, 21 N. E. 747 (1889).

for. Then it becomes the duty of the commissioners to pay for or to reimburse the board or official responsible for the aid given. If the board should fail to file the list of students with the auditor, the board of commissioners cannot be enjoined to reimburse the city board of education.[13] In a similar case, the Appellate Court of Indiana declared that the school board was not authorized to contract a debt on behalf of the commissioners with a third person for furnishing such supplies, but must file the cases with the auditor, who submits it to the commissioners for approval.[14]

SUMMARY

1. When a statute permits a local school board to select its textbooks, its discretion in selection is broad.

2. Some states adopt elementary textbooks by statute, but leave a board to its discretion in the selection of high-school books.

3. When a state has statutory provision that a state agency shall select and adopt textbooks, a local school board has no discretion in a further choice.

4. In California a board may select and buy outright any textbooks it chooses without regard to where they may be printed.

5. Where the district does not buy the books for resale but simply arranges with publishers to place the books with the dealer to be sold at a stated price, a school board has no discretionary power granted or implied to contract with a bookseller and pay him out of the contingent fund for handling books.

6. A school board has a discretionary right to sell textbooks within a school, but it is understood that no undue profit may be realized and that the use of school facilities must be adequately paid for.

7. In some states schoolbooks may be sold to students at cost, but in others the school board may not sell books under any conditions.

8. Where there is no statutory provision to the contrary, a board may use its discretion in the rental of textbooks to pupils, but cannot compel the rental if parents prefer to purchase the necessary books outright.

9. A school board may provide free textbooks only when there is specific statute granting that authority.

10. Where there is a statutory provision by which a board may grant textbooks for free use, the board may use its discretionary power in the imposition of taxes to pay for them.

[13] Shelby County Council v. State *ex rel.* School City of Shelbyville, 155 Ind. 216, 57 N. E. 712 (1900).

[14] Board of Commissioners of Miami County v. Falk, 29 Ind. App. 683, 65 N. E. 10 (1902).

11. A board has a broad discretion in the selection of books for a library.

12. Dictionaries and reference books may be provided for the free use of pupils.

13. Several courts have ruled that a board is not invested with discretion in the purchase of reading-circle books or supplementary readers for the free use of pupils.

14. Where there is statutory provision permitting a board to use its discretion in supplying indigent children with books, Indiana courts have held that it was the duty of the board according to statute to file a list of cases with the auditor and not to contract a debt on behalf of the commissioners without their permission.

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